STATE OF VERMONT

SUPERIOR COURT Franklin Unit	CIVIL DIVISION Docket No. 33-1-19 Frcv
ATHENS SCHOOL DISTRICT, et al., Plaintiffs, v. VERMONT STATE BOARD OF EDUCATION, et al., Defendants.	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Motion Nos. 16 and 17)

This dispute is one of several suits raising similar issues related to the implementation of Act 46 (2015), as amended by Act 49 (2017). In the pending cross-motions, the parties have moved for summary judgment on claims remaining after this Court's recent dismissal of several counts of Plaintiffs' Amended Complaint (filed January 22, 2019). The Plaintiffs ask the Court to vacate all or part of the State Board of Education's November 30, 2018 Final Report of Decisions and Order on Statewide School District Merger Decisions Pursuant to Act 46, Sections 8(b) and 10 (hereinafter the "Final Order"). See Plaintiffs' Motion for Summary Judgment (filed May 3, 2019) and Defendants' Motion for Summary Judgment (filed May 6, 2019). On May 29, 2019, the Court held a hearing on the parties' cross-motions for summary judgment. Upon consideration of the parties' arguments and submissions, the Plaintiffs' Motion for Summary Judgment is *denied*, and the Defendants' Motion for Summary Judgment is *granted in part*.

I. Background

A. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The Court may enter summary judgment when, "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [its] case and upon which [it]

has the burden of proof." Gallipo v. City of Rutland, 2005 VT 83, ¶ 13, 178 Vt. 244 (citation omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. Carr v. Peerless Insurance Co., 168 Vt. 465, 476, 724 A.2d 454 (1998). However, a non-moving party cannot rely on unsupported generalities or speculation to defeat a properly supported motion for summary judgment. See V.R.C.P. 56 (c), (e). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." Robertson v. Mylan Laboratories, Inc., 2004 VT 15, ¶ 48, 176 Vt. 356; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("If the evidence is merely colorable, . . . or is not significantly probative, . . ., summary judgment may be granted.") (citations omitted).

In addition, "[l]egal conclusions and opinions cannot be the proffered basis for rendering summary judgment." Cassini v. Hale, 2010 VT 8, ¶ 23, 187 Vt. 336; see, e.g., Plaintiffs' Statement of Undisputed Material Facts (filed May 3, 3019) at ¶ 1 ("The General Assembly made a conscious choice to leave all voting rights intact . . ."). Moreover, where, as here, the parties ask the Court to review agency action, the isolated, preliminary discussions and comments of individuals involved in the process do not create material issues of disputed facts. See Trudell v. State, 2013 VT 18, ¶ 27, 193 Vt. 515 ("Courts generally give little weight to an individual legislator's interpretation of the law once enacted . . .."); Elmore-Morristown Unified Union School District v. Vermont State Board of Education, No. 32-1-19 Frcv, Ruling on Cross-Motions for Summary Judgment at 24 (Vt. Super. April 29, 2019) (appended to this ruling as Exhibit A and hereinafter referred to as the "Elmore Ruling") ("The Court does not find that the isolated comments which the Plaintiffs highlight support a conclusion that the Board did not read its proposal or otherwise based its decision on materially-erroneous information."). Likewise, when considering a motion for summary judgment, a court must not "accept[] opposing counsel's oral representations in open court as a proper response to the summary judgment motion." Gendreau v. Gorczyk, 161 Vt. 595, 596, 641 A.2d 95 (1993) (mem.). Thus, an opposing party's allegations must be supported by affidavits or other documentary materials which show specific facts sufficient to justify submitting its claims to a factfinder. See Robertson, 2004 VT 15, ¶ 15; Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25, 676 A.2d 774 (1996).

This Court has issued several rulings in this and related matters, and familiarity with those rulings is presumed. See Athens School District v. Vermont State Board of Education, No. 33-1-19 Frcv, Ruling on Plaintiffs' Motion for Preliminary Injunction (Vt. Super. Ct. March 4, 2019) and Ruling on Motions to Dismiss (Vt. Super. Ct. April 12, 2019) (hereinafter referred to as the "Preliminary Injunction Ruling" and the "Motions to Dismiss Ruling"); see generally Elmore Ruling. In the aforementioned rulings, the Court has examined and outlined the

relevant, general facts and procedures related to the passage and implementation of Act 46, as amended by Act 49. These facts are part of the public record; as both parties' relatively concise and targeted Statements of Undisputed Facts further suggest, they appear to not be subject to dispute for the purpose of considering the pending cross motions. See Preliminary Injunction Ruling at 3-7; Elmore Ruling at 2 et seq.

As noted, this Court's Preliminary Injunction Ruling and Motions to Dismiss Ruling addressed some, but not all, of Plaintiffs' claims. The Plaintiffs' remaining and unresolved claims are set forth in Counts I, III and IV of the Amended Complaint and primarily involve two discrete issues: (1) whether the State can legally transfer the debt of one school district to another school district when forcing their merger under Acts 46 and 49; and, (2) whether the denial of merger support grants to school districts which chose not to merge voluntarily under Acts 46 and 49 violates the Common Benefits Clause of the Vermont Constitution.

After oral argument, upon review of the parties' submissions, the Court finds the following material facts undisputed. According to the Legislature, "Vermont's kindergarten through grade 12 student population has declined from 103,000 in fiscal year 1997 to 78,300 in fiscal year 2015." 2015 Vt. Laws No. 46 § 1(a). However, "[t]he number of school-related personnel has not decreased in proportion to the decline in student population." Id. at § 1(b). Overall, "[w]ith 13 different types of school governance structures, elementary and secondary education in Vermont lacks cohesive governance and delivery systems" and "[a]s a result, many school districts: (1) are not well-suited to achieve economies of scale; and (2) lack the flexibility to manage, share, and transfer resources, including personnel, with other school districts and to provide students with a variety of high-quality educational opportunities." Id. at §1(e). Act 46, as amended by Act 49, "implements the State's plan to overhaul how Vermont's education system is organized and governed in order to provide [Vermont PreK-12 students] substantial equity in the quality and variety of educational opportunities in light of rising costs and plummeting student populations." Preliminary Injunction Ruling at 3 (citations and quotation marks omitted).

On June 1, 2018, the Secretary of Education published a 189-page proposed statewide plan to the Vermont Board of Education. This proposed plan was accompanied by a series of supporting appendices, including a 142-page discussion of the Section 9 proposals and a 201-page analysis of common data points for districts that submitted proposals. This plan offered 43 recommendations and proposed merging 18 groups of districts, deferring to three ongoing voluntary mergers, and not merging 22 groups of districts. See Defendants' Statement of Undisputed Material Facts (filed May 6, 2019) at ¶¶ 9-11; Plaintiffs' Response to Defendants' Statement (filed May 22, 2019) at ¶ 9-11.

Beginning on September 19, 2018, the Board held five public meetings to review the Secretary's proposed plan. During its October 2, 2018 public meeting, the Board discussed Act 46's reference to consideration of greatly differing levels of indebtedness. This topic was again addressed during an October 17, 2018 meeting, where the board also discussed the potential merger of districts within the Washington Central Supervisory Union. See Defendants' Statement of Undisputed Material Facts at ¶¶ 21-25; Plaintiffs' Response to Defendants' Statement at ¶¶ 21-25.

On November 30, 2018, after review of the Secretary's proposed plan, the Board issued its Final Report. In the Final Report, the Board ordered the merger of 45 districts, conditionally required an additional four transitions, and did not alter the governance structure of 47 districts. See Defendants' State of Undisputed Facts at ¶ 27; Plaintiffs' Response to Defendant's Statement at ¶ 27. The Final Report was accompanied by default articles of agreement which solely applied to newly created districts. Pursuant to these default articles, some of the involuntary mergers ordered by the Board will result in the merger of existing debt and property, without the consent or vote of the electorate of each affected district. Plaintiffs' Statement of Undisputed Material Facts (filed May 3, 3019) at ¶ 2; Defendants' Statement of Disputed Facts (filed May 23, 2019) at ¶ 2.

The Plaintiffs further argue as undisputed:

> Despite the mandate of Section 7 of Act 49 that the Board [when issuing its Final Order] should recognize "greatly differing levels of indebtedness" as a reason for not merging, the Board ignored that directive and merged districts carrying millions upon millions of dollars of indebtedness, debt that was incurred with the consent of the electorate, with districts that carried no indebtedness and, in fact, had established long-term plans and reserves for capital repairs.

Plaintiffs' Statement of Undisputed Facts at ¶ 18. Plaintiffs' interpretation is not supported by the undisputed record and is not material to the Court's resolution of the cross-motions. As noted supra, the Board clearly reviewed districts' arguments involving differing levels of indebtedness.

In addition, in their written submissions and during oral argument, the parties have admitted that, for the purpose of considering the "debt" issue, the merger involving Washington Central Unified Union involves the most substantial differential in debt. According to the Plaintiffs, as a result of this merger, "two towns with no debt and the lowest median and average adjusted gross income (Worcester and Calais) would take on millions of dollars of debt while the town with the second highest level of income in the supervisory union would receive nearly

50% debt relief." Plaintiffs' Statement of Undisputed Facts at ¶ 69. In response, the Defendants explain that

> it is undisputed that the Washington Central Unified Union will assume all of the debts and properties of the Berlin, Calais, East Montpelier, Middlesex, Worcester, and U-32 districts. More specifically, the new district will assume bonded debt of the Berlin, East Montpelier, Middlesex, and U-32 districts. It is also undisputed that Worcester and Calais will not transfer bonded debt to the new district and that residents within Worcester and Calais have lower median and average adjusted gross incomes than residents within the other forming districts. It should also be noted that Plaintiffs' focus on relative income levels ignores the fact that homestead property tax rates are income sensitive as described below in paragraph 71.
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> 70. It is undisputed at the Washington Central Unified Union School District will assume all of the debts of the forming districts, that its budgets will include the cost of servicing its debts, and that the homestead property tax rate throughout the district will be uniformly determined by state statutory formulas. No debt transfers will occur between towns.

Defendants' Statement of Disputed Facts at ¶¶ 69-70.

The Plaintiffs further assert that "[i]n the first year of the involuntary merger there would be an additional $165,485 added to the school budget for the Calais Elementary School and $110,324 added to the school budget for the Worcester Elementary School." Plaintiffs' Statement of Undisputed Fact at ¶ 71. The Defendants dispute the Plaintiffs' characterization of the effect of the transfer of debt associated with merger:

> There will only be one budget in the first year of operation of the Washington Central Unified School District – the budget of the unified district. The Thompson Affidavit [relied upon by Plaintiffs] also presumes that the merger will produce no savings at all. Even if this unlikely assumption is correct, the homestead property tax rate for taxpayers in Berlin and Middlesex will likely change less than 1% following the merger, the homestead property tax rate in East Montpelier will likely decline approximately 4%, and the homestead property tax rate in Calais and Worcester will likely nominally increase by approximately 4%. . . .
>
> However, it should be noted that Plaintiffs' focus on relative income levels ignores the fact that homestead property tax rates take income into account, which will offset, in whole or in part, depending upon the household, any nominal merger related increases. In Calais, for example, more than three-quarters of homestead owners currently receive homestead property

> tax credits based on their income level, with an average credit of $ 1679. . .. In addition, the combined municipal and net education taxes for more than one quarter of Calais households – those with household incomes of $ 47,000 or less – are capped at statutory percentages producing an additional average credit of $ 684 for these households.

Defendants' Statement of Disputed Facts at ¶ 71 (citations to supporting portions of the record omitted). In short, the undisputed record supports a conclusion that the tax effect of merger and attendant debt transfer, if any, upon particular communities or households is speculative, based upon individual circumstance, and more directly impacted by tax laws other than Acts 46 and 49. The Court further finds undisputed that the Board specifically determined that the amount of the debt differential was not "great" and therefore did not, in and of itself, prevent district merger with Washington Central. See, e.g., Final Order at 12 ("While there is clearly a differential in debt, the Board does not find that it meets the threshold in the law of 'greatly' differing levels of debt.").

The Plaintiffs also have alleged that the way Acts 46 and 49 treat small school support grants violates the Common Benefits Clause of the Vermont Constitution, Vt. Const. ch. I, art. 7. At oral argument and in their submissions, the parties have offered Peacham as the dispositive example related to this claim. See, e.g., Plaintiffs' Statement of Undisputed Facts at ¶¶ 29 et seq. Before this year, Peacham was eligible for small school support grants pursuant to 16 V.S.A. §§ 4015 et seq. See Plaintiffs' Statement of Undisputed Fact at ¶ 29; Defendants' Statement of Disputed Facts at ¶ 29. The Defendants also point out that only one district, Peacham, has standing to raise the challenge in Count IV because it is the only Plaintiff district that actually has been denied a small school grant for fiscal year 2020. See Paige v. State, 2018 VT 136, ¶ 14, 205 A.3d 526 (challenge by taxpayer must be supported by direct financial injury as a result of the legislation); Defendant's Motion for Summary Judgment at 37.

In 2010, the Legislature enacted Act 153, which provided incentives for voluntary school mergers. See 2010 Vt. Laws No. 153 §§ 2-4. In 2012, the Legislature again addressed voluntary mergers in Act 156. See 2012 Vt. Laws No. 156. Acts 153 and 156 did not achieve the Legislature's goal of encouraging voluntary statewide consolidations in that these laws did not result in a substantial number of merged school districts. See Defendants' State of Undisputed Facts at ¶ 4 ("Prior to the enactment of Acts 153 and 156, there were 276 school districts in Vermont... After ... there were 267..."); Plaintiffs' Response to Defendant's Statement at ¶ 4 (undisputed decrease from 276 to 267 but disputed that this is a "limited" impact).

As part of the Legislature's statewide education governance plan, Act 46 provided temporary tax incentives to encourage districts to voluntarily merge. See

2015 Vt. Laws No. 46 §§ 6 and 7. Act 46 also makes what are called merger support grants available for voluntary mergers involving small schools. Id. at §§ 6(b)(2) and 7(b)(2).

These Act 46 merger support grants change the nature of small school support under 16 V.S.A. § 4015 (a). For example, prior to Act 46, an "Eligible school district" was one "that: operates at least one school; and (A) has a two-year average combined enrollment of fewer than 1000 students in all the schools operated by the district . . .." As amended by Acts 46 and 49, and effective July 1, 2019, 16 V.S.A. § 4015 (a) now provides:

> (1) "Eligible school district" means a school district that:
>
> > (A) operates at least one school with an average grade size of 20 or fewer; and
> >
> > (B) has been determined by the State Board, on an annual basis, to be eligible due to either:
> >
> > (i) the lengthy driving times or inhospitable travel routes between the school and the nearest school in which there is excess capacity; or
> >
> > (ii) the academic excellence and operational efficiency of the school, which shall be based upon consideration of:
> >
> > > (I) the school's measurable success in providing a variety of high-quality educational opportunities that meet or exceed the educational quality standards adopted by the State Board pursuant to section 165 of this title;
> > >
> > > (II) the percentage of students from economically deprived backgrounds, as identified pursuant to subsection 4010(d) of this title, and those students' measurable success in achieving positive outcomes;
> > >
> > > (III) the school's high student-to-staff rations; and
> > >
> > > (IV) the district's participation in a merger study and submission of a merger report to the State Board pursuant to chapter 11 of this title or otherwise.

See 2015 Vt. Laws No. 46, § 20; 2017 Vt. Laws No. 49, § 44.

Accordingly, § 20 generally bases small school grant support eligibility on more than school size alone, and in subsection (1)(ii)(IV), it continues to encourage eligible schools to explore merger with other districts. In June 2018, the Board adopted metrics for determining grant eligibility for schools which chose to not merge voluntarily. See 2015 Vt. Laws. No. 46, § 21. Prior to Act 49, such grants were based upon school size alone. See Defendants' Statement of Undisputed Facts at ¶ 12; Plaintiffs' Response at ¶ 12. Grants distributed upon the newly implemented metrics, however, are now related to the measurement of five factors noted in § 20.

At oral argument, the Defendants represented that districts which have merged voluntarily may receive their merger support grants at the 2016 small school grant rate in perpetuity. By contrast, districts like Peacham currently must apply yearly to receive grant support for its small schools.

B. Peacham's Common Benefits Clause claim

Peacham's school district did not pursue voluntary merger with another district. Peacham is currently a non-merged part of the 3x1 structure consisting of several neighboring towns and known as the Caledonia Cooperative Unified Union School District. See Plaintiffs' Statement of Undisputed Facts at ¶¶ 30-32; Defendants' Statement of Disputed Facts at ¶¶ 30-32. As part of its collaboration with the Caledonia Cooperative, "Peacham has had six additional students who have chosen to attend school in Peacham but who are not residents of Peacham. One of those students has special needs and is accompanied by a paraprofessional who is paid by the sending district and who serves only that one student." Plaintiffs' Statement of Undisputed Facts at ¶ 33.

Based upon the newly implemented metric, Peacham was denied a grant. Peacham received 7.5 of 17 available points: 3 points on the overall academic testing metric; 1.5 on the academic testing metric that measures differential outcomes based on socioeconomic status; 1 point on the poverty metric; 2 on the staffing ratio metric, and 0 points on the merger report metric because it did not submit a report. See Defendants' Statement of Disputed Facts at ¶ 34. The Defendants do not dispute Plaintiffs' contention that, had Peacham received the required 8 point minimum, its grant would have been approximately $90,000. Defendants' Statement of Disputed Facts at ¶ 36; Plaintiffs' Statement of Undisputed Facts at ¶ 36.

However, the parties dispute the reasons underlying Peacham's failure to reach the metric's 8 point minimum and therefore receive the $90,000 grant. Peacham asserts that the denial is due to the State's arbitrary inclusion as staff of the paraprofessional who serves the one aforementioned special needs student. See

Plaintiffs' Statement of Undisputed Material Facts at ¶¶ 33-36. As the vice chair of the Peacham School Board explains:

> 6. In applying the new metrics adopted by the State Board of Education for determining eligibility for small school support grants, for schools that were not voluntarily merged pursuant to a vote of their electorate under Act 46, Peacham was denied this funding on the basis of the student/staff ratio metric.
>
> 7. In calculating Peacham's student/staff ratio the Agency of Education included the paraprofessional that accompanied the student from an outside district, who was paid by that outside district and who served that student from an outside district.
>
> 8. None of the students from the outside districts were included in this calculation. Absent this para-professional the amount of the grant would have been approximately $90,000. Without accepting this special needs student and accompanying para-professional Peacham would have been well within the metrics that would have allowed for receipt of the grant.

Affidavit of Jessica Philippe (appended to Plaintiffs' Motion for Summary Judgment as Exhibit O). According to Peacham, its "students are now being punished with the loss of $90,000 in education funding" because of the State's arbitrary application of the new metric in violation of the Common Benefits Clause. Plaintiffs' Motion for Summary Judgment at 49.

In response, the State argues that Peacham's student/staff ratio provides one reason, but not the primary reason, for its grant ineligibility. Defendants' Statement of Disputed Facts at ¶ 34. As the finance manager for the Vermont Agency of Education outlines:

> 10. The category of student to staff ratios is calculated by comparing student enrollment to staff members. Certain staff are excluded from the calculation, including any pre-Kindergarten staff, licensed special education staff, food service staff, and maintenance and transportation staff. This metric counts staff in the same way that staff are counted generally for education purposes in Vermont—based on where they work—a practice that is driven by federal data reporting guidelines. . ..

Affidavit of Brad James (appended to Defendants' Statement of Disputed Facts as Exhibit P). Upon application of these standards, Peacham received 2 out of 4 on the staffing ratio metric. Moreover, Peacham only received 3 out of 4 points in the category of academic performance, 1 out of 4 for socioeconomic equity in the student population (a proxy-measure for poverty), 1.5 out of 4 points for equity in academic

results, and zero on the additional point available for districts that submitted a merger report. Defendants' Statement of Disputed Facts at ¶ 34 (citing Affidavit of Brad James). Accordingly, the Defendants argue that "Peacham was ineligible primarily because it has a very low poverty rate, a disparity in testing results between advantaged and disadvantaged students[,] and chose not to submit a merger report." Defendants' Reply in Support of Motion for Summary Judgment (filed May 23, 2019) at 39.

II. Discussion

A. Plaintiffs' Count I Rule 75 Claim

In Count I, the Plaintiffs maintain, on a variety of grounds, that the Board's Final Order is arbitrary and capricious because, in Act 46, the Legislature did not empower the Board to force mergers. See Plaintiffs' Motion for Summary Judgment at 2. In partial response, the Defendants maintain that the Court has no jurisdiction to review the Board's Final Order under Rule 75. See Defendants' Motion for Summary Judgment at 1 et seq. The Court has considered and rejected both these arguments. See Elmore Ruling at 17 ("[T]he court finds that Rule 75 provides jurisdiction to review the Plaintiffs' claims."); Preliminary Injunction Ruling at 13 ("[T]he delegation under Acts 46 and 49 is constitutional, and [] the Legislation, as supplemented by the Board's regulations, supplies sufficient, statute-consistent standards . . . ."); Motions to Dismiss Ruling at 7 ("[T]he court finds the Legislature's delegation of the implementation of Acts 46 and 49 does not violate the Ch. II, §§ 5,6 and 68 of the Vermont Constitution.").

In addition, in its motions and at oral argument, the Plaintiffs have argued their interpretation of the significance of the words "possible," "practicable," "necessary" and "best" as used in Acts 46 and 49. See, e.g., Plaintiffs' Motion for Summary Judgment at 4-6, 11 et seq.; Appellants-Plaintiffs' Statement of Undisputed Material Facts at ¶¶ 4-5. They suggest, for example, that the Final Order "merges districts regardless of what the best means for meeting the goals of Act 46 might be" and that there is "no evidence the Board even discussed what was meant by 'to the extent necessary'." Id. at 12-13.

As a general matter, the Court has rejected the argument that these words, as used in Act 46, constitute the type of mandatory directives urged by the Plaintiffs. In its Preliminary Injunction Ruling at 17-18, this Court explained:

> Contrary to the Plaintiffs' assertion, Act 46 does not require the Board to find that the mergers to which they are subject are the only or best means of meeting the Goals set forth in Acts 46 and 49. Properly understood, one overarching objective of Act 46 is to merge school districts; the Legislature already has made the determination that such mergers are necessary to

achieve, among its stated Goals, economies of scale and quality education for Vermont's student population. See, e.g., 2015 Vt. Laws No. 46 §§ 5(c)(2), (3) (suggesting alternative structure mergers "achieved whenever possible"). Again, viewed overall, Acts 46 and 49 reflect the Legislature's strong preference that individual school districts be merged, when possible, to create "sustainable models of education governance." 2015 Vt. Laws No. 46, § 2.

Thus, the word "necessary," as used in the provisions about which Plaintiffs complain, reflects a recognition that the Board will have to take certain actions to achieve mergers, which in turn, will meet the Legislature's stated Goals. See Definition of necessary. (2019). In Oxford Dictionaries Online. Retrieved February 21, 2019 from en.oxforddictionaries.com (first listed meaning as "Needed to be done, achieved or present; essential"). There is no individual "necessity" finding required that is divorced from the Act 46 directive that the Board should take feasible actions to merge schools into a preferred or alternative governance structures.

In addition, in Count I.1, the Plaintiffs allege that "[t]he Board ignored the Legislature's explicit directive in Act 46 to analyze and allow alternative governance structure proposals in light of the fact that a merger 'may not be possible or the best model to achieve Vermont's education goals in all regions of the state'. Act 46, Sec. 5(c)." Amended Complaint at 39. In Count I.2, the Plaintiffs allege that "[t]he Board violated Act 49's explicit requirement that 'the state board of education shall not by rule or otherwise impose more stringent requirements upon an alternative governance structure than those of this Act'. Act 49, Sec. 20." Amended Complaint at 45.

The gravamen of this argument is the Plaintiffs' contention that "[t]he clear statutory language and legislative intent of Act 49, Section 20 is to require that the Board approve every alternative governance structure proposal that meets the statutory requirements." Amended Complaint at 45, ¶ 231. The Court has rejected the notion that the Board was required to approve such alternative governance structures:

> Importantly, § 8 must be read in conjunction with the rest of Act 46. Act 46 establishes the presumption that preferred structures best meet all the Goals. It places the burden on an objector to merger into possible and practicable preferred structures to persuade the Board that its alternative structure constitutes a superior means of meeting the statewide and local Goals, which include the establishment of a more consistent statewide governance plan. See 2015 Vt. Laws. No. 46, § 1(e) ("With 13 different types

of school district governance structures, elementary and secondary education in Vermont lacks cohesive governance and delivery systems.

. . .

Thus, properly understood and applied, § 8(b) offers the Board circumscribed flexibility in circumstances where, for example, there may be a legal or practical impediment to creating a preferred governance structure. Under those circumstances, it permits the Board to consider forming or continuing an alternative governance structure; it may do so if it finds that an alternative structure is the best means of meeting the Goals, and where a preferred structure cannot be formed or is for some reason detrimental to the Goals in Act 46.

Here, then, Act 46 did not, as the Plaintiffs advocate, require the Board to forego establishing a preferred governance structure when such a merger is possible and practicable. In addition, it did not require the Board to address all assertions in their Section 9 proposal for the purpose of weighing whether their current governance structure is "best" as compared to what the Legislature has determined is the "preferred." **In other words, when a merger into a preferred governance structure is possible and practicable, that preferred governance structure, according to the Legislature, is presumptively the best means of meeting the Goals, unless the affected school districts establish otherwise. Where, as here, the Board rejected a proposal to maintain an alternate governance structure, that decision is tantamount to a finding that a preferred governance structure will best meet the Goals established by the Legislature. Furthermore, it reflects that the proponents of the status quo did not meet their burden of convincing the Board that it should forego creating a "possible" and "practicable" preferred structure in favor or retaining their current alternative governance structure.**

Elmore Ruling at 23-24 (emphasis added).

In short, the Plaintiffs have presented no material facts which show that the Board either misinterpreted or misapplied Acts 46 and 49. Plaintiffs' primary example in support of its arguments is that the Board did not properly consider the issue of geographic isolation. See Plaintiffs' Motion for Summary Judgment at 24. The Final Order clearly indicates that the Board did consider relevant factors, including geographic isolation. See, e.g., Final Order at 6 ("Geographic realities, variations in operating structures, and the requirement that any district that is not its own SD must be assigned to a multi-district SU have limited the Board's ability to create true preferred structures, given the authority granted to it by the Act."); 8

("In constructing the final statewide plan, the Board looked for opportunities to create preferred structures, but where this was not possible (e.g., due to dissimilar operating structures, which cannot be merged under the law) or practicable (e.g., due to a lack of geographic cohesiveness), the Board chose to implement an alternative structure with the attributes specific in the law (including that supervisory unions have the smallest number of school districts practicable."); 29 ("Due to structural variations and geographic anomalies, some existing school districts cannot merge to form a unified governance structure unless they or their neighbors choose to make their current operating and tuitioning structures. Only the voters have the power to make those decisions, however. Such changes are outside the authority granted to the State Board in Act 46.").

In Count I.3, the Plaintiffs allege that "[t]he Board violated Act 49's explicit recognition that districts in a supervisory union of 900 or more students should be allowed to remain independent where 'the supervisory union has the smallest number of member school districts practicable *after consideration of greatly differing levels of indebtedness among the member districts*.' Act 49, Sec. 7." Amended Complaint at 47 (emphasis in original). This claim is echoed in Count III. As discussed infra, the Board did consider indebtedness and, in the case of Plaintiff districts with the greatest differing levels of indebtedness, found the effect of that differential debt to be insubstantial.

In Count I.4, the Plaintiffs allege that "[t]he Board violated Act 49 and 16 V.S.A. § 706n by imposing default Articles of Agreement without an opportunity to make use of the 90-day period to draft their own articles and by replacing articles for already-existing union boards without following the requirements of 16 V.S.A. § 706n." Amended Complaint at 51. The Court has addressed the basic relationship between the Legislature's delegation under Act 46 and the Default Articles of Agreement:

> [T]he Plaintiffs argue that construing Acts 46 and 49 as permitting the Board to formulate and implement the Default Articles of Agreement will result in an unconstitutional delegation of the General Assembly of its power to legislate. See Plaintiffs' Sur-reply at 19. "Act 49 provides that districts subject to involuntary merger under the Final Report have 90 days to adopt their own articles of agreement; otherwise, those districts are subject to the Board's Default Articles of Agreement." Preliminary Injunction Ruling at 20. On its face, Act 49, § 8 (d) specifically authorized the Board to formulate Default Articles of Agreement and to implement them, if needed, stating: "The statewide plan required by subsection (b) of this section shall include default Articles of Agreement to be used by all new unified union school districts created under the plan unless and until new or amended articles are approved." Under these circumstances, this authorization is not a delegation

of the Legislature's power to pass laws. **Rather, Act 49, § 8 permissibly grants authority necessary to implement the Legislature's delineated goal of moving "toward sustainable models of educational governance." 2015 Vt. Laws No. 46, § 2**; see Stowe Citizens, 169 Vt. at 560-61 ("Nor is the [delegation] doctrine violated when the Legislature gives municipalities the authority or discretion merely to execute, rather than make, the laws."); Royalton College, Inc. v. State Board of Education, 127 Vt. 436, 449, 251 A.2d 498 (1969) ("The provision for the adoption of rules and regulations to implement the duties of the board are sufficient indicia that the legislature had in mind that these powers must be reasonably exercised and the demands of procedural due process respected.").

For the reasons set forth in the Preliminary Injunction Ruling, and as further examined herein, the Court finds the Legislature's delegation of the implementation of Acts 46 and 49 does not violate the Ch. II, §§ 5, 6 and 68 of the Vermont Constitution. Counts II and VI are dismissed for failure to state a claim upon which relief can be granted.

Motions to Dismiss Ruling at 6-7 (emphasis added). Accordingly, the Plaintiffs have presented no facts which persuade the Court to change its determination that the Board has broad implementation authority, including the authority to issue the Default Articles.

Furthermore, the Court has rejected the unsupported argument that Act 49 and 16 V.S.A. § 706a et seq. cannot be harmonized. See Preliminary Injunction Ruling at 21 ("Plaintiffs provide no persuasive authority for their apparent belief that the directives of Acts 46 and 49, as implemented under the Default Articles of Agreement, cannot and should not be viewed as complementary to and in harmony with provisions currently in 16 V.S.A. §§ 701a et seq. . . ."). After merger, the Plaintiffs are able lawfully to amend the Default Articles; this fact makes it possible to give effect to both legislative enactments. See Gallipo v. City of Rutland, 173 Vt. 223, 235, 789 A.2d 942 (2001) (Goal is to harmonize statutes and not find conflict.).

In Count I.5, the Plaintiffs allege that "[t]he Board proposed commingled votes to merge Windham, Barnard, Cambridge, Orwell, and Huntington with their respective unified districts in a Modified Unified Union School District violate 16 V.S.A. § 721(b) and Act 49, which exempts Modified Unified Union School Districts from the State Plan." Amended Complaint at 52. Plaintiffs' objection to votes involving modified unified union districts is unclear. Act 46 permits the Board to request modified unions which are not subject to involuntary merger to hold merger votes voluntarily, and it authorizes the Board to merge those districts subject to involuntary merger. See e.g., 2017 Vt. Laws No. 49 § 8 adding 2015 Vt. Laws No. 46 § 10(f)(1)(B) (in relevant part, stating "Secretary of Education shall make

supplemental Transitional Facilitation Grant . . . [where] either on its own initiative or at the request of the State Board, [district] agrees by vote of its electorate to merge with another school district . . ..").

Lastly, in Count I.6, the Plaintiffs generally state that "[t]he Board's actions were arbitrary and capricious because they were standardless and inconsistent." Amended Complaint at 54. As noted supra, the Court has addressed and rejected this "general" lack of standards argument. The Court already has determined that "the delegation under Acts 46 and 49 is constitutional, and that the Legislation, as supplemented by the Board's regulations, supplies sufficient, statute-consistent standards to guild its decisions and to permit this Court's review." Preliminary Injunction Ruling at 13. The Court has further noted: "Thus, a review of the Board's Final Report indicates that it accepted and considered a variety of evidence and evaluated that evidence in light of the statutory guidelines." Preliminary Injunction Ruling at 16. Accordingly, the Plaintiffs' Motion for Summary Judgment on Count I of the Amended Complaint is denied, and the Defendants' Motion for Summary Judgment is granted. Upon review under Rule 75, the Board's Final Order is not arbitrary, capricious or contrary to applicable law.

B. Plaintiffs' Count III Municipal Debt Claim

The Plaintiffs claim that they are entitled to summary judgment on Count III "because the State lacks the authority to impose one municipality's bonded debt on another without that municipality's consent." Plaintiffs' Motion for Summary Judgment at 34. In addition, Plaintiffs argue that the Legislature never delegated the power to transfer debt, as is authorized under the Default Articles of Agreement. Id. at 38-41. These claims are also mirrored in Count I.3 of the Amended Complaint.

Plaintiffs' underlying premise is flawed in that it mischaracterizes the merger transaction. School district mergers do not result in the direct imposition of one municipality's debts on another municipality; existing debt is transferred to the newly created trustee school district. Regarding the State's authority to transfer debt where school districts are merged, the Court has observed:

> Finally, Plaintiffs object to decisions which they maintain shift property and impose additional debt on some municipalities as a result of forced merger. See, e.g., Amended Complaint at 38 et seq. They argue that implementation of the ordered forced mergers ignores the probability that they will be saddled with the debt of other districts and deprived of their education-related property.

As a matter of law, school district assets lawfully belong to the State; therefore, the State, through its delegate Board of Education and over Plaintiffs' objections, can require transfer of these assets. See Town of Brighton v. Town of Charleston, 114 Vt. 316, 321-22, 44 A.2d 628 (1945) ("The power of the state, unrestrained by the contract clause or the 14th Amendment, over the rights and property of cities held and used for governmental purposes cannot be questioned."); Village of Hardwick, 98 Vt. 343, 129 A. at 161 ("Such property as a municipality holds [for public purposes], in a legal sense, belongs to the state."); accord New Castle County School District v. State of Delaware, 424 A.2d 15 (Del. 1980) (Statute requiring transfer of school district property for "$1.00" held constitutional.); People ex rel. Dixon v. Community Unit School District No. 3, 2 Ill.2d 454, 466, 118 N.E.2d 241 (Ill. 1954) ("The 'property of the school district' is a phrase which is misleading. The district owns no property, all school facilities, such as grounds, buildings, equipment, etc., being in fact and law the property of the State and subject to the legislative will."); Central School District No. 1 of the Towns of Colchester, et al. v. State of New York, 18 A.D.2d 943, 237 N.Y.S.2d 682 (N.Y. App. Div.1963) ("The lands appropriated by filing of map on March 4, 1958, were held by respondent school district for school purposes and thus in a governmental capacity. . . . Consequently, the district was not entitled to compensation upon the taking by the State.") (citations omitted); Hazlet v. Gaunt, 126 Colo. 385, 393, 250 P.2d 188 (1952) ("We believe the law to be well settled that consent of particular districts, or the inhabitants thereof, is not necessary as a constitutional prerequisite to the changing of boundaries, dissolution or division of school districts, or to the transfer of assets from an existing school district to the larger reorganized district of which it becomes a part.").

Preliminary Injunction Ruling at 19.

Legally, then, the mergers at issue involve the transfer of education-related assets and liabilities which districts or municipalities hold in trust for the State. After merger, these assets and debts are not transferred from one municipality to another, as the Plaintiffs maintain, but instead are transferred from one extinguished state trustee to a newly created trustee. See Jones v. Vermont Asbestos Corp., 108 Vt. 79, 182 A. 291, 297 (1936) (Legislature has right to change trustee agencies it had created.).

Town of Barre v. School District No. 13 in Barre, 67 Vt. 108, 30 A. 807 (1894), presented a situation analogous to the present one. In Town of Barre, the Legislature eliminated School District No. 13 and, in its stead, established the Town of Barre as a school district. The Supreme Court determined that, where the

legislature abolishes one school district and establishes new, larger one, the former school district entity no longer exists, and the former district's benefits and burdens are transferred to the new trustee body. The court reasoned:

> The acts of 1892 declare that all such school districts shall no longer exist, "except for the settlement of their pecuniary affairs," and constitute each town into a single district, for school purposes. These acts contain no specific provision in regard to the settlement of such pecuniary affairs. They provide that the town shall take charge of all the school buildings and property, and assume and pay all debts outstanding incurred for the purchase of land and the erection and repair of the schoolhouses. The money which the defendant had April 1, 1893, coming from its own tax, and what it should realize from the uncollected taxes, had by law and the vote of the district been appropriated to defraying its current expenses and to the payment of its indebtedness. It belonged to the defendant, and not to its taxpayers, to be used for these purposes. The defendant. . . was a trustee, created by law, for the accomplishment of a state purpose, and for the execution of the policy of the state of educating all the youth of its inhabitants. The $313.45 which it received from the town, as its portion of the public money, had been devoted and set apart by law to the accomplishment of the same purpose. It held this in trust for school purposes. . .. The defendant, a legal entity, created by law to carry forward this state purpose, though compelled by the state to create part of the fund in controversy, has no right nor power to divert any of it from the purpose to which the law has devoted it. By Acts 20 and 21 of the Laws of 1892, the legislature has provided that the defendant shall cease to exercise the function of a public educational trustee, and the town is created such public trustee, charged with the duty and given the power to carry on the trust. It has become the legal successor and trustee in place of all the school districts into which, under the law theretofore, it had divided its territory. . .. Here the legislature has created the successor, and the work of the trust is being carried forward by it. The education of its youth is a state work, created, controlled, and enforced by public laws. It follows that the legislature has the right and power to determine when, how, and by whom its work shall be carried on; to change the agencies it has created; and to control and direct the expenditure of any unexpended fund it has caused to be raised for such purpose.

Id.

This reasoning supports the conclusion that here, the State's transfer of bond debt incurred by a town, in its capacity as a school governance entity declared defunct under Act 46, does not constitute a direct imposition of bond debt on the towns which make up the newly formed district and therefore is not contingent on

obtaining the consent of a municipalities' voters. For this reason, Downtown Rutland Special Tax Challengers v. City of Rutland, 159 Vt. 218, 617 A.2d 129 (1992), which involves a special tax assessment imposed by a municipality, is inapposite.

The Plaintiffs further argue that, through Acts 46 and 49, the Legislature has unlawfully suspended their voting rights under 16 V.S.A. § 721 et seq. Where possible, the Court is required to harmonize applicable statutory provisions. On its face, § 721 appears inapplicable here. Title 16 V.S.A. § 721 (a) applies to votes related to "Action initiated by district outside the union," and § 721 (b) applies to votes related to "Action initiated by union school district." As explained, the Final Order's forced mergers are actions initiated by the State. As discussed, education is State responsibility, and the State is entitled to reconfigure school districts pursuant to Acts 46 and 49.

Accordingly, the Court concludes that through Act 46 and 49, the State may merge both assets and debt, where is has extinguished one school district and formed a new successor governance body. This particularly makes sense in Vermont. It appears undisputed that Vermont does not maintain "ghost districts" to pay off legacy bonded debt. See Defendants' Motion for Summary Judgment at 29. Moreover, if members of a newly created district and its students are to gain access to benefits of merger, such as access to new buildings, programs, and economies of scale, then it also is fair and rational that the new district also accepts the bonded debt which accompanies those benefits.

Lastly, when issuing the Preliminary Injunction Ruling, and due to the incomplete record, the Court expressed concern regarding the potential unfair effects of debt transfer on the school tax liability of affected taxpayers. See Preliminary Injunction Ruling at 20. Addressing these concerns, the Defendants proffer that Calais, "in the region with the greatest debt disparity identified by Plaintiffs, the Board ordered a merger that could reduce taxes everywhere through savings, and if no savings are realized at all, is expected to reduce taxes in some areas while increasing them by approximately 4% in others." Id. at 34. The Board noted:

> **The UHSD No. 32 and the Berlin, Calais, East Montpelier, Middlesex, and Worcester School Districts**
>
> The issues for these districts are much the same as for the other districts in this grouping. The small size of some of these districts causes difficulty in evaluating the achievement gap and supports for students. The union high school district is running well and that same model should work well for the elementary schools. While there is clearly a differential in debt, the Board

does not find that it meets the threshold in the law of "greatly" differing levels of debt.

The Board notes that the Secretary's Proposed Plan identified unequal opportunities among the schools, and that the Sec. 9 Proposal did not rebut this. In addition, creation of a unified union school district in this instance leads to its designation as a supervisory district, the Legislature's "preferred structure."

For these reasons, the reasons articulated in the Secretary's Proposed Plan for these districts and as discussed at the Board's October 17, 2018 meeting leading up to its provisional decision for them, the Board: (i) finds that the Secretary's proposal satisfies and meets the requirements of Act 46, as amended, our Rules, and other applicable law, and (ii) approves the Secretary's proposal for these districts.

Accordingly, the Board confirms the provisional decision for these districts made at its October 17, 2018 meeting and approves the Secretary's proposals for them for the reasons stated at that meeting and as reflected in the Minutes.

Final Order at 12-13.

This Court's review pursuant to Rule 75 is circumscribed. The Court must determine whether the Board's Final Order is arbitrary and capricious, not whether it would have made the same decision. See Devers-Scott v. Office of Professional Regulation, 2007 VT 4, ¶ 6, 181 Vt. 248 ("We affirm factual findings of administrative tribunals when they are supported by substantial evidence. . .. Evidence is substantial if, in looking at the whole record, it is relevant and a reasonable person could accept it as adequate.") (citation and quotation marks omitted). On the current record, the Court cannot conclude that the Board's ordered merger of Calais is arbitrary and capricious in that it involves a disparity of debt which prohibits merger under Act 46. Accordingly, the Plaintiffs' Motion for Summary Judgment on Count III is denied, and the Defendants' Motion for Summary Judgment is granted.

C. Count IV: Violation of Common Benefits Clause

1. General consideration of grants under the new metric

The Plaintiffs' final remaining claim involves the Common Benefits Clause of the Vermont Constitution. They argue that they are entitled to summary judgment on Count IV because the distribution of small schools grants and the granting of incentives only to voluntarily merged districts violates *Brigham* and the Common Benefits Clause. Plaintiffs' Motion for Summary Judgment at 43 et seq. They point

out that towns like Peacham, which have not voluntarily merged, must apply for grants under the new metric/point system, whereas merged towns appear eligible to receive such grants without application and in perpetuity. They appear to have abandoned any separate Equal Protection claim under the Fourteenth Amendment to the U.S. Constitution. Compare Amended Complaint at 64 (citing the Equal Protection Clause) with Plaintiffs' Motion for Summary Judgment at 43-49 (no briefing of federal equal protection).

In relevant part, the Common Benefits Clause of the Vermont Constitution provides:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefensible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

Vt. Const. ch. I, art. 7. While similar in purpose to the federal Equal Protection Clause, the Vermont Supreme Court has not approached and interpreted the Common Benefits Clause identically. See Baker v. State, 170 Vt. 194, 203, 744 A.2d 864 (1999). "That approach may be described as broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective." Id. (emphasis in original). Specifically, a court is to "accord deference to legislation having any reasonable relation to a legitimate public purpose." Badgley v. Walton, 2010 VT 68, ¶ 21, 188 Vt. 367 (citation and quotations omitted). Classification must "bear a reasonable and just relation to the governmental objective in light of contemporary conditions." Baker, 170 Vt. at 206.

Thus, the Vermont Supreme Court "has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be premised on an appropriate and overriding public interest." Id. (citation and quotation marks omitted).

> When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection. Our concern here is with delineating, not with labelling the excluded class as "suspect," "quasi-suspect," or "non-suspect for purposes of determining differing levels of judicial scrutiny.
>
> We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the

challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.

We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.

Id. at 212-214 (footnotes omitted).

For example, in Brigham v. State of Vermont, 166 Vt. 246, 265, 692 A.2d 384 (1997), the Supreme Court found that Vermont's "distribution of a resource as precious as educational opportunity may not have as its determining force the mere *fortuity* of a child's residence" and therefore violated the Common Benefits Clause. (emphasis in original). The Brigham court noted that, under the Vermont Constitution, education is a fundamental right and that "any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification." Id. at 256. This "heavy burden of justification" implies a more searching scrutiny, where "the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective." Id.at 265.

Also instructive is the Supreme Court's decision in Badgley v. Walton, 2010 VT 68, 188 Vt. 367. In Badgley, the Supreme Court found that a statute which prohibited state troopers from remaining employed beyond age 55 did not violate the Common Benefits Clause. When conducting its analysis, the court first identified the part of the community affected by this law as "public safety employees assigned to the police and law enforcement duties over the age of fifty-five who, before their fifty-fifth birthday, were [nevertheless] capable of working as police officers." Id. ¶ 22.

Next, the court accepted the legitimate governmental purpose for including some members of the community but excluding others as "having a mentally and physically capable police force." Id. ¶ 23. Recognizing one might argue that governmental purpose appears imprecisely executed, the Court explained:

> Our function is not to substitute our view of the appropriate balance for that of the Legislature. In our Common Benefits Clause inquiry, we do not judge whether the policy decision made by the Legislature was wise, but rather whether this decision to exclude a portion of the community from the common protection of the law was reasonable and just in light of its purpose.

Id. ¶ 24.

The Badgley court then examined the third element, "whether the mandatory retirement provision bears a reasonable and just relationship to legitimate state interests," in light of the three factors identified in Baker, 170 Vt. at 214. 2010 VT 68, ¶ 25 et seq. With respect to the "significance of the benefits to the excluded group," the court found that, while the statute forces a person to retire, it does not foreclose other employment; moreover, the right to work as a state-employed officer is not as significant as the right to educational opportunities addressed in Brigham. Id. ¶ 28. Regarding the second factor, the court found that mandatory retirement does advance the State's goal of having a fully capable police force. Id. ¶ 30.

Finally, regarding the third factor, "whether the classification is overinclusive or underinclusive," the court observed that though "overinclusive in meeting the need to ensure public safety, the degree of overinclusiveness is speculative, especially in relation to the interdependent nature of the work." Id. ¶35. Ultimately deferring to the Legislature's classification and maintaining the presumption that statutes are constitutional, the Supreme Court opined that

> the exact issues being debated in this litigation remain under active investigation and consideration in the political process.
>
> The latter point is important for cases like this. A determination of unconstitutionality would end development of the issue in Vermont. The Legislature, by contrast, can experiment with different approaches to protecting public safety, without irrevocably choosing one until the right approach is clear. The underlying facts are in flux, and changes in those facts will affect that nation's and Vermont's responses. . ..

Id. ¶¶ 40-41.

Based on the Supreme Court's aforementioned instruction, the Court finds that Count IV does not generally implicate a violation of the Common Benefits Clause. On its face, the new metric-based merger grant system represents a rational way for the state to meet its legitimate education goals. The part of the community potentially disadvantaged by the new metric-based merger grant system consists of towns like Peacham, which did not pursue voluntary merger with another district. The purpose the merger grant system is to encourage school districts to merge into new governance structures, in order to meet the identified

goals of Act 46, which include providing statewide equity and variety in student educational opportunities and maximizing operational efficiencies among the State's various school districts. See Elmore Ruling at 2-4.

Clearly, merger grants, which encourage and reward mergers in service of the legislative goals set forth in Act 46, bear a reasonable and just relationship to the governmental purpose of improving educational opportunities for all Vermont students. Undoubtedly, additional grant money for non-merged towns constitutes a significant benefit; however, as in Badgley, non-merged school districts can still receive grants under the new metric system. Moreover, on the current record, the fact that only Peacham's application has been denied suggests that the current grant system is not significantly over or underinclusive. Finally, the new merger support grants reflect the State's continuing goal of encouraging small districts to merge into larger governance structures, an end which, as the Court has explained, is a legitimate one. Cf. Vermont Human Rights Commission v. State of Vermont, 2012 VT 88, ¶ 14, 192 Vt. 552 ("Statutory time limits reflect legislative judgments concerning the relative values of repose on the one hand, and vindication of both public and private legal rights on the other.") (quotation marks omitted).

During oral argument, the Plaintiffs indicated that the loss of grant money Peacham previously has received could result either in higher taxes for Peacham property owners or in the loss of school employees. As a factual matter, the effect on property owners, if any, is speculative and subject to adjustments under other applicable tax laws. Offering an alternative analysis, the Defendants also characterize this' claim as one akin to a challenge to tax incentives and merger support grants; they argue in response that the Plaintiffs' small school grant claims should be viewed as comparable to tax incentives and analyzed using rational basis scrutiny under the Proportional Contribution Clause of the Vermont Constitution. See Defendants' Motion for Summary Judgment at 35, 38; USGen New England Inc., 2003 VT 102, ¶ 29, 176 Vt. 104 ("To the extent a taxpayer is claiming that government action imposes a higher burden on the taxpayer than others generally, this is exactly the type of challenge the Proportional Contribution Clause is intended to address.").

In a case involving a power company's challenge of a tax valuation, the Supreme Court noted:

> The more appropriate analysis to apply here, where there is a constitutional challenge to a legislative act that temporarily alters the relative tax burden of a particular class of taxpayers, is the jurisprudence of the Proportional Contribution Clause, Vt. Const. Ch. I, Art. 9. Article 9 provides in relevant part: "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute the member's proportion towards the expense of that protection. . . ." The

> Proportional Contribution Clause imposes no greater restriction on governmental action than the Equal Protection Clause of the Fourteenth Amendment to the United State Constitution. . . . Thus, the test of validity of governmental action under the clause is the rational basis test used for federal equal protection analysis.

USGen New England, 2003 VT 102, ¶ 15 (citations and quotation marks omitted).

Applying the Proportional Contribution Clause analysis bolsters the Court's conclusion that requiring non-merged districts to apply for grants under the new grant metric scheme is constitutional. See Schievella v. Department of Taxes, 171 Vt. 591, 593, 765 A.2d 479 (2000) ("[R]easonable schemes of taxation must have flexibility, and some difference of treatment between citizens is virtually inevitable."). The Plaintiffs do not appear "disadvantaged" as compared to others similarly situated, that is, other districts that must demonstrate entitlement for grants under the new metric. See Quinlan v. Five-Town Health Alliance, Inc., 2018 VT 53, ¶ 24, 192 A.3d 390 ("The disadvantage experienced by the plaintiff and other similarly situated litigants is not created by [the statute requiring plaintiff to file a certificate of merit with medical malpractice complaint]. Rather it is created by their own inadvertence, their decision on when to file the action, and the operation of the applicable statute of limitations."). Furthermore, this Court has already recognized that consolidation of school districts and their resources constitutes a rational way to address issues such as dwindling student populations and uneven statewide access to educational opportunities. Encouraging such consolidation through merger grants, even if imperfect, is nevertheless a rational way to achieve that goal. See Preliminary Injunction Ruling at 23. For these reasons, the Plaintiffs' Motion for Summary Judgment on Count IV of the Amended Complaint is denied, and the Defendants' Motion for Summary Judgment is granted.

2. The metric as applied to Peacham

"It is a well known principle that, though a statute is valid on its face, the manner of its enforcement may be invalid if found to be unconstitutionally discriminatory." In re Smith, Bell & Hauck Real Estate, Inc., 132 Vt. 295, 301, 318 A.2d 183 (1974). A statute may be "constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." State v. Messier, 145 Vt. 622, 630, 497 A.2d 740 (1985) (citation and quotation marks omitted).

While relevant to the issue of under or overinclusiveness, the fact that Peacham is the only district denied a grant under the new metric is also problematic. Peacham argues that the State's application of the metric in its case

constitutes a punishment for its refusal to merge. In addition, the loss of $90,000 is arguably attributable to Peacham's decision to voluntarily educate a special needs student from another district. In this instance, the loss of the grant, by a mere half point, appears arbitrary and certainly does not appear to advance the State's goal of educating students. The Court finds a material factual dispute on the issue of whether, in this particular case, the application of the metric to deny Peacham's grant violates the Common Benefits Clause.

Conclusion

1. Defendants' Motion for Summary Judgment is *granted as to Counts I and III.*

2. To the extent the Court finds that the State's newly implemented scheme of distributing of grants under its metric/point system generally does not violate the Common Benefits Clause, Defendants' Motion for Summary Judgment is *granted as to Count IV.*

3. However, because there are material factual disputes concerning the application of this metric/point system to deny, this year, Peacham's application for a support grant, the Defendants' Motion for Summary Judgment on Count IV is *denied* as to Peacham's specific claim for relief. The clerk shall set this claim for a prompt evidentiary hearing; allow three hours for the hearing unless counsel advise that more than three hours of hearing time will be needed to determine whether Peacham would have been awarded its support grant if it had not agreed to accept the special needs student and aide.

4. The Plaintiffs' Motion for Summary Judgment is *denied.*

So ordered.

Dated at St. Albans, Vermont, this 18th day of June, 2019.

Robert A. Mello
Superior Court Judge

STATE OF VERMONT

SUPERIOR COURT Franklin Unit	CIVIL DIVISION Docket No. 32-1-19 Frcv
ELMORE-MORRISTOWN UNIFIED UNION SCHOOL DISTRICT, STOWE SCHOOL DISTRICT, and LAMOILLE SOUTH SUPERIVORY UNION, Plaintiffs, v. VERMONT STATE BOARD OF EDUCATION, Defendant.	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Motion Nos. 4 and 5)

The instant dispute is one of several suits arising from the implementation of Act 46 (2015), as amended by Act 49 (2017). This Court has issued several rulings in another Act 46-related suit, and familiarity with those rulings is presumed. See Athens School District v. Vermont State Board of Education, No. 33-1-19 Frcv, Ruling on Plaintiffs' Motion for Preliminary Injunction (Vt. Super. Ct. March 4, 2019) and Ruling on Motions to Dismiss (Vt. Super. Ct. April 12, 2019) (hereinafter referred to as the "Athens Preliminary Injunction Ruling" and the "Athens Ruling on Motions to Dismiss").

In this action brought pursuant to V.R.C.P. 75, the Plaintiffs, Elmore-Morristown Unified Union School District ("EMUU"), Stowe School District, and Lamoille South Supervisory Union (collectively referred to as "EMUU-Stowe") claim that the Vermont State Board of Education (hereinafter the "Board") acted arbitrarily and capriciously in reaching its decision set forth in the Board's Final Order on Statewide School District Merger Decisions Pursuant to Act 46 Sections 8(b) and 10 (dated November 28, 2018) (hereinafter the "Final Report"). In the Final Report, the Board, over Plaintiffs' objections, ordered the merger of EMUU, which had only recently been formed through unification of Elmore and Morristown, and Stowe School District. See Plaintiffs' Cross-Motion for Summary Judgment (filed March 1, 2019) at 8; Plaintiffs' Opposition to Cross-Motion for Summary

Judgment (filed April 1, 2019) at 1. On April 22, 2019, the Court held a hearing on the parties' cross-motions for summary judgment. Upon consideration of the parties' arguments and other submissions, the Board's Motion for Summary Judgment is *granted*, and the Plaintiffs' Cross-Motion for Summary Judgment is *denied*.

I. Background

A.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). The Court may enter summary judgment when, "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [its] case and upon which [it] has the burden of proof." Gallipo v. City of Rutland, 2005 VT 83, ¶ 13, 178 Vt. 244 (citation omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. Carr v. Peerless Insurance Co., 168 Vt. 465, 476, 724 A.2d 454 (1998). However, a non-moving party cannot rely on unsupported generalities or speculation to defeat a properly-supported motion for summary judgment. See V.R.C.P. 56 (c), (e). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." Robertson v. Mylan Laboratories, Inc., 2004 VT 15, ¶ 48, 176 Vt. 356; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("If the evidence is merely colorable, . . . or is not significantly probative, . . ., summary judgment may be granted.") (citations omitted). Thus, an opposing party's allegations must be supported by affidavits or other documentary materials which show specific facts sufficient to justify submitting its claims to a factfinder. See Robertson, 2004 VT 15, ¶ 15; Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25, 676 A.2d 774 (1996).

After oral argument and upon review of the parties' submissions, the Court finds the following material facts undisputed.

On June 2, 2015, Vermont enacted Act 46, portions of which were amended in 2017 by enactment of Act 49. See Joint Stipulation of Facts (filed March 1, 2019) at ¶¶ 3,4. In Act 46, the Legislature declared that "[o]n or before July 1, 2019, the State shall provide educational opportunities through sustainable governance structures designed to meet the goals set forth in Sec. 2 [hereinafter "the Goals"] . . . ." 2015 Vt. Laws No. 46, § 5(a). New governance structures should be "designed to encourage and support local decisions and actions" that meet the following Goals:

(1) provide substantial equity in the quality and variety of educational opportunities statewide;

(2) lead students to achieve or exceed the State's Education Quality Standards, adopted as rules by the State Board of Education at the direction of the General Assembly;

(3) maximize operational efficiencies through increased flexibility to manage, share, and transfer resources, with a goal of increasing the district-level ratio of students to full-time equivalent staff;

(4) promote transparency and accountability; and

(5) are delivered at a cost that parents, voters, and taxpayers value.

2015 Vt. Laws No. 46, § 2.

Basically, Act 46 created a multi-phase scheme encouraging education-related entities throughout Vermont to undertake voluntary merger. See, e.g., 2015 Vt. Laws No. 46, §§ 6, 7. "The General Assembly defined a legal framework to guide voluntary mergers and other school district governance actions through processes that would ensure that the final constellation of governance structures would possess certain key attributes, either through the 'preferred structure' (a supervisory district) or through the 'alternative structure' (a supervisory union containing more than one school district)." Final Report at 5 (appended to Joint Stipulation at Exhibit S). As outlined infra and as is relevant to the instant dispute, school districts not planning on pursuing voluntary merger by July 1, 2019 are required to evaluate their ability to meet or exceed the Goals established by the Legislature and to present proposals for alternative structures, first to the Secretary of Education for an initial review, and then to the State Board of Education for final rejection or approval. See 2015 Vt. Laws No. 46, § 9.

Accordingly, through Act 46, the Legislature is attempting to move the entire State "toward sustainable models of educational governance" and "to ensure that [small] schools have the opportunity to enjoy the expanded educational opportunities and economies of scale that are available to schools within larger, more flexible governance models." 2015 Vt. Laws No. 46, §§ 2, 3(b). As explained in the Secretary of Education's June 1, 2018 report, in Act 46, "[t]he Legislature determined that the '**preferred structure**' for school districts in Vermont is a UUSD [Unified Union School District] that is large enough to operate as its own SU [Supervisory Union]," thereby "eliminat[ing] both the overarching administrative layer of an SU and its board as well as the SU assessments over which voters have no direct control." See Joint Stipulation at Exhibit H, p. 22; see also 2015 Vt. Laws No. 46, § 5(b). "However, Act 46 recognizes that a preferred, unified system may not be 'possible or the best model' to achieve the Goals in all regions of the State

and, in these situations, an SU with multiple, member districts (an "alternative structure") 'can' meet the Goals, particularly if the SU manifests specific characteristics" outlined in 2015 Vt. Laws No. 46, § 5(c). See July 29, 2016 Guidance: Proposals by One or More Non-Merging Districts for an "Alternative Structure" Under Act 46 (2015), appended to Joint Stipulation at Exhibit D, p. 1.

In its simplest form, an alternative structure under Act 46, §5 (c) may be defined as "an SU composed of multiple member districts, each with its separate school board." See id. Exhibit D at p. 2. As the July 29, 2016 Guidance further notes, an alternative structure is an exception to the establishment of a preferred, unified system, that is, "a supervisory district with an ADM of at least 900." Id. at Exhibit D, p. 3; accord 2015 Vt. Laws No. 46 § 8(b).

In relevant part, the July 29, 2016 State Board Guidance related to submission of proposals for alternative structures continues:

> ***C. Act 46 contemplates that a non-merging district's or group of districts' proposal for an "alternative structure" is considered only in connection with the development of the statewide governance plan.***
>
> When preparing the *preliminary* proposed statewide plan for presentation to the State Board, the Secretary's analysis must include (1) *"consideration"* of the proposals submitted by a non-merging district or group of districts for an "alternative structure" and (2) "conversations" with those and other districts.
>
> Act 46 requires the State Board to "review and analyze the Secretary's proposal" under the same standards required for the Secretary's proposal. The Act authorizes, but does not require, the Board to take testimony or ask for additional information from districts and supervisory unions. The State Board then "publish[es] . . . its order merging and realigning districts and supervisory unions where necessary" either by approving the Secretary's proposal in its original form *or* in an amended form under the same standards required for the Secretary's proposal.
>
> Act 46, which created the concept of proposals for "alternative structures," does not include any other *process* by which a district or group of districts presents a proposal for an "alternative structure" or by which the proposal is reviewed.
>
> ***D. Nothing in Vermont law requires the Board to incorporate a non-merging district's proposal into the final statewide plan. Similarly, nothing requires that an alternative structure included within the final statewide plan is the same as a proposal presented by a non-merging district or group of districts.***
>
> [See subsection "C" above]

E. An "alternative structure" is an <u>exception</u> to the creation of a preferred, unified system (a supervisory district with an ADM of at least 900).

1. A preferred, unified system "may not be possible or the best model to achieve [the Goals] in all regions of the State. In these situations, [an "alternative structure"] can meet the [Goals], particularly if" the SU manifests specific, identified qualities.

2. The Secretary of Education is required to present to the State Board a proposed statewide education governance plan "that . . . would move districts into a more sustainable, preferred model of governance" to the extent necessary to promote provision of educational opportunities designed to meet the Goals.

"***<u>If</u>** it is not possible or practicable"* to merge some districts, where necessary, into the preferred, unified structure *while also adhering to* the protections for tuition-paying and operating districts; or otherwise meeting all aspects of the preferred, unified system"

> a. "***<u>then</u>*** the proposal ***<u>may also include</u>*** alternative governance structures ***<u>as necessary</u>***"
>
> b. "***<u>provided that</u>*** any proposed alternative governance structure shall be ***<u>designed</u>***" to:
>
> i. "insure adherence" to protections for tuition-paying and operating districts; and
>
> ii. "promote" the Goals.

3. Act 46 also provides:

> The State Board shall approve the creation, expansion, or continuation of a supervisory union ***<u>only if</u>*** the ***<u>Board concludes</u>*** that this ***alternative structure:***
>
> > (1) ***is the <u>best</u> means of meeting the [Goals] in a particular region;*** and
> >
> > (2) ensures transparency and accountability for the member districts and the public at large. . ..

F. When considered globally, points A-E above cumulatively suggest that a proposal by a non-merging district or group of districts for an "alternative proposal" – particularly if the proposal is to maintain the current structure of an existing SU—should be the <u>final option</u>, after all other opportunities for merger and collaboration have been

considered and determined not to be possible or the best option for meeting the Goals in the region.

. . .

G. When considered globally, points A-F above cumulatively suggest that the burden is on the non-merging district(s) to demonstrate due diligence and to provide sufficient, thoughtful evidence in support of a proposal to form an alternative structure.

. . .

H. A proposal is evaluated not just on its own merits, but also on the impact it may have on neighbors not included in the proposal.

As the more SU-centric perspective of Phase 1 voluntary mergers ends, the State Board's focus is becoming increasingly expansive—on both the regional and statewide levels. . ..

Joint Stipulation at Exhibit D, pp. 2-5 (footnotes omitted; all emphasis in original).

On August 1, 2016, Vermont's Agency of Education issued "Summary: Unmerged Districts and Alternative Governance Structures," in which it provided further guidance, "not hav[ing] the force of law," regarding districts that do not voluntarily merge in to a preferred structure. See Joint Stipulation at Exhibit C, p. 2. Acknowledging the "need in some regions to create or continue sustainable 'alternative structures'," the summary notes, in part:

Providing guidance regarding "alternative structures," Act 46 states in Section 5 that:

> a supervisory union composed of multiple member districts, each with its separate school board, can meet the State's [education] goals, *particularly* if:
> (1) the member districts consider themselves to be collectively responsible for the education of all prekindergarten through grade 12 students residing in the supervisory union;
> (2) the supervisory union operates in a manner that maximizes efficiencies through economies of scale and the flexible management, transfer, and sharing of nonfinancial resources among the member districts;
> (3) the supervisory union has the smallest number of member school districts practicable, achieved whenever possible by the merger of districts with similar operating and tuitioning patterns; and
> (4) the combined average daily membership of all members districts is not less than 1,100.

When evaluating an "alternative structure," the State Board must conclude that the proposal is the *best* means of meeting the goals of quality and equity in the region and ensuring that fiscal transparency and accountability. The State Board must also be mindful that a proposal doesn't geographically isolate a district that has no other obvious partners, especially if the district has low fiscal capacity or high poverty rates.

. . .

Alternative governance structures are a necessary element in the overall Act 46 framework, because Act 46 does ***not***:

1) require that all school districts merge into larger governance units;

2) establish any required minimum average daily membership (ADM) for all school districts;

3) restrict or repeal (or allow restriction or repeal of) the current authority of school districts to continue to pay tuition or to operate a school; or

4) change the amount or manner in which a district pays tuition.

Joint Stipulation at Exhibit C, p. 1-2.

On June 26, 2017, the Agency of Education promulgated a set of rules titled "Series 3400—Proposals for Alternative Structures Under Act 46." See Joint Stipulation at Exhibit E. As this Court has noted, "Rule Series 3400 provides guidance for entities submitting Section 9 proposals in order to assist the Board in meeting its statutorily delegated obligations." Athens Ruling on Motions to Dismiss at 9. The Series 3400 Rules reflect and incorporate Acts 46, 49, and other relevant provision of Vermont law and "are intended to provide (1) a process by which school districts can propose to be in an Alternative Structure when the proposal does not include voluntary merger and (2) details about some of the supporting information that a district should consider when self-evaluating for purposes of presenting a proposal to merge or a proposal under Act 46, Sec. 9 and that the State Board considers when reviewing merger proposals and will be considering when reviewing proposals under Sec. 9 and creating the Statewide Plan." Rule 3420 Statement of Purpose (appended to Joint Stipulation at Exhibit E, p.3).

On November 30, 2017, EMUU-Stowe submitted their joint "Proposal for an Alternative Governance Structure." See Joint Stipulation at Exhibit G. In that submission, the Plaintiffs "propose[d] to continue as side-by-side PreK-12 operating districts assigned to the Lamoille South Supervisory Union." Id. at Exhibit E, p. 3.

On June 1, 2018, the Secretary of Education released the "Proposed Statewide Plan for School District Governance 2015 Acts and Resolves No. 46, Sec. 10(a)." See Joint Stipulation at Exhibit H. Explaining Act 46's "Goals and Mandates," the Secretary's June 1, 2018 report notes:

> As mentioned above, the law identifies the preferred model of school governance in Vermont to be a unified union school district with an average daily membership of at least 900 that provides for the education of its PreK-12 resident students in one of the four most common operating/tuitioning patterns and is large enough to function effectively as its own single-district supervisory union.
>
> The law requires the State Board to "move districts into the more sustainable, preferred model of governance" "to the extent necessary to promote" the Legislature's stated purpose, except where it "is not possible or practicable" to do so. Some mergers are not "possible" because the law does not permit the State Board to merge districts with unlike operating and tuitioning patters [sic].
>
> The law's stated purpose for requiring the State Board to create final statewide plan is to "provide educational opportunities through sustainable governance structures designed to meet" the educational and financial goals of Act 46 concerning equity, excellence, and efficiency.
>
> The same legislative mandates and guidance govern development of both this proposal and the State Board's final statewide plan.

Id. at Exhibit H, p. 15 (footnotes omitted).

Moreover, the Secretary offered a number of "Thematic Observations" concerning Act 46. Of relevance to this dispute is the following:

> **Act 46 Disfavors the Continued Existence of Supervisory Unions Where Merger is Possible**
>
> Many of the Section 9 proposals and the subsequent conversations argued *against* joining a larger governance unit based on the premise that the district and its fellow supervisory union members currently collaborate very well and have achieved savings or operational efficiency within the existing supervisory union. The most frequent illustration of this argument was the delivery of special education or transportation services on a supervisory union level, actions required by law since 2012. The fact that some efficiencies have been achieved within a supervisory union does not mean that the current structure is the best way to achieve efficiencies. There are obvious merits in removing this layer of additional structure.

> Furthermore, Act 46 expressly identifies PreK-12 systems of 900 or more students as the preferred structure for meeting the five goals of the Act. There are efficiencies and opportunities available to a unified union school district that are not available to even the most efficiently run supervisory union. Preference for the structure currently in place or "the way we've always done things" is not sufficient to outweigh the legal requirements to create larger, more sustainable governance structures where possible and practicable.

Id. at Exhibit H, pp. 18-19. Echoing previously-cited laws and public records, the Secretary explained the "Legal Mandate" as follows:

> The Legislature acknowledged that the statewide plan may also include "alternative governance structures *as necessary*, such as a supervisory union with member districts or a unified union school district with a smaller average daily members" "***if*** it is not possible or practicable [to merge districts into the preferred structure] in a manner that adheres to . .. the . . . protections for tuition-paying and operating districts" or "that otherwise meets all aspects of" a preferred structure.
>
> The State Board's final statewide plan may include multi-district SUs "***only if*** the Board concludes that this alternative structure . . . is the ***best*** means of meeting the [Goals] in a particular region; and... ensures transparency and accountability for the member districts and the public at large.
>
> In general, statutes require that the State Board review every type of education governance proposal not only on its own merits, but also on the impact it may have on the students, the districts, the region, and the State.

Id. at Exhibit H, pp. 23-24 (footnotes omitted; all emphasis in original.).

Regarding the Plaintiffs' Section 9 proposal, the Secretary first noted that the Plaintiffs did not appear to meet the 900 ADM threshold:

> In 2015, the voters of Elmore and Morristown voted to create the Elmore-Morristown UUSD ("EMUU"), which provides for the education of its resident students by operating schools for K-12. The Stowe School District is a single-town districts [sic] that also operates all grades. The two districts are the sole members of the Lamoille South SU.
>
> In FY 2018, the Kindergarten ADM of EMUU is 776.51. The Stowe District has a similar ADM of 704.43, for an SU total of 1,480.94. The districts' joint Section 9 Proposal notes that the county's population is projected to grow by 3.6%. Agency data reveal that while the Stowe K-12 ADM has increased by 23.4 students from FY 2014 to FY 2018, both Elmore and Morristown have shown decreases in that same period of 4.1 and 30.3 students, respectively.

> Elmore's ADM numbers jumped in FY 2015 but have been steadily declining since then, while Morristown's students were relatively stable until a decrease of 25 ADM students occurred from FY 2017 to FY 2018.

Id. at Exhibit H, p. 146.

The Secretary then observed: "Not only is the merger of the EMUU and Stowe Districts 'possible' and 'practicable' in this instance, but the unified district would also be of a size sufficient to support the functions of an SU, thereby creating what the Legislature has determined to be a 'preferred structure'." Id. at Exhibit H, p. 147. Nevertheless, the Secretary's ultimate and contradictory recommendation was that merger was not advisable:

> **Accordingly**, *because the Secretary believes that it is not practicable to require merger at this time because it would not advance the goals of Act 46, the Secretary does not propose that the State Board merge the Elmore-Morristown Unified Union School District and the Stowe School District in the statewide plan. By the time the State Board is required to issue its statewide plan in November, it may have additional information with which to make the final decision.*

Id. at Exhibit H, p. 149 (emphasis in original).

On October 29, 2018, the Board met to consider the Secretary's recommendations. The draft meeting minutes reflect:

> Chair Huling began discussion on Elmore-Morristown UUSD and Stowe SD. She read the Secretary's proposed recommendation which states that the Secretary believes that it is not practicable to require merger at this time because it would not advance the goals of Act 46. Perrin said that he has not found a reason to agree with the Secretary's proposal and said they are already in the same SU. O'Keefe, Carroll and Mathis agreed with Perrin. O'Keefe said that this proposed recommendation has received a lot of criticism.
>
> Perrin made a motion: "For the reasons articulated in the Secretary's June 1, 2018 proposed Statewide Education Governance Plan's proposal for the Elmore-Morristown UUSD and Stowe School District, I move that the Board provisionally: (i) find that the proposal satisfies and meets the requirements of Act 46, as amended, our Rules and other applicable law, and (ii) approve the Secretary's proposal for those School Districts, subject to final approval by the Board and after further review and deliberation prior to November 30, 3018." Beck seconded the motion. Discussion followed regarding a missed opportunity by not merging, a lot of time already given and the successful

Elmore-Morristown merger which allowed Elmore to be a viable school. The motion failed unanimously.

Id. at Exhibit K, pp. 3-4.

On November 12, 2018, the Chairs of both the EMUU and Stowe District jointly submitted a letter asking the Board to reconsider its October 29, 2018 vote. Id. at Exhibit M. In this letter, the Chairs also sought to clarify some misperceptions which they believe surfaced during the Board's October 29 meeting:

> **Average Daily Membership (ADM)**
>
> The Secretary's ADM count only included consideration of K-12 students. ADM ***by definition*** includes all students in a district PK-12. Act 46 clearly speaks to the entire ADM, not a K-12 subsection. Therefore, we would like to state for the record that the correct 2017 ADM for EMUU is **898.85** (of note, this is 1.15 students away from meeting the SU school threshold determined by the state). The correct ADM of Stowe is **761** (bucking the trend, Stowe continues to grow and is projected to meet the 900 threshold within the decade).
>
> **Time and Impact in EMUU**
>
> The VSBE [Vermont State Board of Education] discussion revealed a misunderstanding of the sequence of events that led to EMUU. The unification process began in 2016, after two separate votes (not 2015 as discussed by members of the VSBE). The first organizational meeting occurred on March 22, 2016, and operations began on July 1, 2016. It is also important to note that pieces of the transition process are still underway, including building avenues for school choice to select classes at the Elmore School, phrasing out "grandparented" tuition students, and building community engagement and support for our newly merged district.
>
> Further, this merger was not merely a merger of 19 students, as mentioned in the SBE meeting. This merger impacted a total of 126 Elmore students, and the process of transitioning these students continues.
>
> . . .
>
> **Complaints by Other Districts**
>
> At the October 29 meeting, members of the VSBE discussed their concerns that other districts in Vermont complained that Stowe was getting a free pass by not being forced to merge. By all legal standards, that concern is irrelevant. The EMUU/SSD proposal should be reviewed on its own merits and not be compared with other districts' proposals or concerns. Similarly, discussion that focuses on Stowe alone is unduly dismissive of the impact of a

> governance change on the students and communities of Elmore and Morristown, whose student body makes up 62% of our supervisory union.

Id. at Exhibit M, p. 2 (emphasis in original); see id. at Exhibit L (transcript excerpts from October 29, 2018 Board meeting).

When the Board met on November 15, 2018, it once again reviewed the Secretary's recommendation to maintain EMUU-Stowe's current alternative governance structure. See Joint Stipulation at ¶ 17. The Board's Draft Minutes reflect that Plaintiffs' representatives "asked the Board to reconsider and reverse the action taken on October 29 to reject the Secretary of Education's recommendation to approve the EMU[U]-Stowe application for the status quo governance structure." Id. at Exhibit O, p. 10. Their presentation included the offer of additional data and information about current "organization culture" which they believe best meets the Goals of Act 46. Id. When Oliver Olsen asked about current enrollment, Plaintiffs' representative responded: "EMU[U]'s enrollment is 895 ADM students. Stowe is 775. Together we're over – roughly just short of 1700 students." Joint Stipulation at Exhibit P, p. 168.

Commenting on the reason for his provisional vote rejection of the Secretary's recommendation regarding EMUU-Stowe, John Carroll explained:

> You asked about why we voted. Speaking only for myself, my vote was based largely upon my reading of the Secretary's assessment and explanation of her recommendation, and I call it rather weak tea when she said something like the Secretary trusts that EMU and Stowe concern for the well being of their children will compel them eventually to blah, blah, blah. Well that's nice to trust and all that. Didn't seem very persuasive. I have to admit that at that time I had not actually sat down and read this 137-page document, but just to show you what a nerd I am, I have.

Id. at Exhibit P, 169-70. After further discussion, a motion for reconsideration of the Board's October 29 provisional vote forcing the merger of EMUU and Stowe failed to pass. Joint Stipulation at ¶ 18 and Exhibit P, p. 226.

On November 28, 2018, the Board met to finalize its provisional decisions and orders. Draft minutes from this meeting reflect the following exchange:

> Olsen said that on page 23, he wanted to offer a motion to amend the report with respect to the Elmore-Morristown-Stowe districts Secretary's proposal #26 to affirm the Secretary's original recommendation, rationale and decisions the June 1 proposed statewide plan. Carroll seconded the motion and suggested to add necessary editorial corrections. Huling opened it up for discussion. Mathis asked why this motion was offered. Olsen spoke about feeling like the Morristown and Stowe districts made a compelling case to

remain distinct districts, have sufficient scale, have demonstrated that they are meeting the goals of the law and that their current structure allows them to meet those goals, of all the feedback received across the state this one was found to be the most compelling, they had a very clear Section 9 proposal, and that Morristown is almost at 900 and at a scale to be an SU, and concern about the capital needs of the districts and these putting them in an adversarial relationship. There was further discussion that if they are working well together that merger makes good sense, that capital needs could be improved upon with a merger, graduation requirements and EQS, and a large amount of support for this decision. Beck weighed in that she found their testimony compelling and that they are meeting the goals of Act 46. Carroll advised to not make the perfect the enemy of the good, but that it is important to recognize the subtleties. Huling spoke about this decision being disconnected from other decisions and that she did not see a clear vision of how the separate structure will help them to meet the goals of Act 46. Olsen spoke to having a greater concern for Elmore and that a shift in structure could shift a financial imbalance. There was more discussion about debt disparity existing in other places and it was suggested that this be given back to the Legislature. O'Keefe asked to call the vote. Chair Huling called a roll vote. . .. The vote was tied at 4:4. Chair Huling broke the vote with a nay. The motion failed.

Id. at Exhibit Q, p. 8.

On November 28, 2018, the Board issued its Final Report. See Joint Stipulation at Exhibit S. To carry out the Legislature's directive that it formulate a final statewide plan, "the Board looked for opportunities to create preferred structures, but where this was not possible (e.g., due to dissimilar operating structures, which cannot be merged under the law) or practicable (e.g., due to a lack of geographic cohesiveness), the Board chose to implement an alternative structure with the attributes specified in the law. . . ." Id. at Exhibit S, p. 8. Upon review, the Board reversed several of the Secretary's recommendations to maintain the status quo and ordered merger, including the merger of EMUU and Stowe. Accepting in part the Secretary's analysis of the Plaintiffs' situation, the Board explained:

> The Secretary's Proposed Plan acknowledged that a merger of the EMMUU [sic] and Stowe Districts was both "possible" and "practical" and would result in a unified district that is sufficiently large to be its own supervisory district, the legislatively-designated "preferred structure." Nevertheless, the Proposed Plan concluded that merger is not practicable at this time, citing the "entirely unique situation" presented by the EMUU Board's request for additional time to adjust to the governance arising from its voluntary creation before the EMUU "considers assuming the additional challenge of

> further merger." (Proposal at p. 148). The Secretary also noted that there is no other district in the region with which it would be practical for the Stowe School District to merge. . .. The State Board agrees with the Proposed Plan's analysis that the merger of EMUU and Stowe is both possible and practicable, but we disagree with the Plan's conclusion against merger. EMUU is in its third year of operation. At the time of merger, the Elmore School District operated only one school, which provided for the education of approximately 20 students in grades 1-3. The Secretary's conclusion and proposal are not consistent with the proposals the Plan makes in connection with other, similarly-structured districts. Creation of a unified union school district in Elmore, Morristown, and Stowe is in fact practicable because the obstacles and concerns described by the Secretary and by the affected communities are not significant impediments to a merger; merger would achieve the goals of Act 46, as amended. In addition, creation of a unified union school district in this instance leads to its designation as a supervisory district, the Legislature's "preferred structure."

Id. at Exhibit S, p. 24; cf. Defendant's Statement of Undisputed Material Facts (filed March 6, 2019) at ¶ 75 (listing other districts with ADMs above 700 which merged).

B.

The gravamen of the Plaintiffs' complaint is that the Board acted arbitrarily and capriciously in requiring their merger. See Plaintiffs' Cross-Motion for Summary Judgment (filed March 1, 2019) at 8; Plaintiffs' Opposition to Cross-Motion for Summary Judgment (filed April 1, 2019) at 1. Plaintiffs argue that they submitted an alternative governance structure proposal pursuant to § 9 of Act 46, in which they explained (1) why their current school governance structure is the "best means" for EMUU-Stowe to meet the goals of Act 46, and (2) why merger into a "preferred structure" is neither necessary nor in the best interests of their students. See Amended Complaint at ¶ 4.

While the Secretary of Education agreed with the Plaintiffs, the State Board of Education, after several votes, rejected the Secretary's determination and ordered merger in its Final Report. See Amended Complaint at ¶¶ 5-8. The Plaintiffs assert that the Board relied upon incorrect data and that its Final Order reflects biased decision-making in that it embodies a hostility to alternative governance structures. See, e.g., Plaintiff's Opposition to Cross-Motion at 6.

In a four-count Amended Complaint (filed December 28, 2018), the Plaintiffs set forth the following claims:

Count I: The Board violated State and Federal Procedural Due Process protections by conducting an arbitrary and capricious process. (Amended Complaint at ¶¶ 112-15).

Count II: The Board violated State and Federal Due Process protections by failing to make findings required by Act 46 and Rule 3450 that the mergers are "necessary" or the "best means" of meeting the goals of Act 46. (Amended Complaint at ¶¶ 116-19).

Count III: The Board violated State and Federal Due Process protections, by focusing on whether mergers are "possible" and "practicable," as opposed to "necessary" or the "best means" of meeting the goals of Act 46. (Amended Complaint at ¶¶120-24).

Count IV: The Board's order violated the separation of powers principle and otherwise constitutes a delegation of legislative powers in violation of Chapter II, Section 5 of the Vermont Constitution. (Amended Complaint at ¶¶ 125-31).

At oral argument, the parties admitted that no issue related to consolidation of debt currently exists for the Court's review. See Parker v. Town of Milton, 169 Vt. 74, 77, 726 A.2d 477 (1998) (no actual controversy where parties speculating about impact of a grievance). In addition, the Plaintiffs do not raise an Equal Protection claim, nor do they specifically "challenge the General Assembly's authority to reform school governance structures in Vermont. . .. Rather, Plaintiffs object to the particular processes used by the State Board and the General Assembly to reach the decision to dissolve EMUU and the Stowe School District." Amended Complaint at ¶¶ 10-11.

In fact, both at oral argument and in its motion, the Plaintiffs admit that merger is both possible and practicable. "Rather, EMUU-Stowe has consistently stated that merger is simply not necessary to meet the goals of Act 46 and in fact is counterproductive to those goals." Plaintiffs' Cross-Motion for Summary Judgment at 35. Plaintiffs seek a declaration that the Board violated the Vermont and Federal Constitutions and the issuance of a stay preventing the Board from enforcing its Final Order. See Amended Complaint at 40.

II. Discussion

A. Jurisdiction under V.R.C.P. 75

As a threshold matter, the Board argues that Rule 75 does not permit this Court to consider all of Plaintiffs' claims, in particular, their due process claims. See Defendant's Reply in Support of Motion for Summary Judgment (filed April 2, 2019) at 5. V.R.C.P. 75 (a) provides:

> Any action or failure or refusal to act by an agency of the state or a political subdivision thereof, including any department, board, commission, or officer, that is not reviewable or appealable under Rule 74 of these rules . . . may be reviewed in accordance with this rule if such review is otherwise available by law.

Where a statute, like Act 46, is silent on the right to appeal, the Vermont Supreme Court has indicated that review under Rule 75 is permitted if comparable to a petition for extraordinary relief, such as certiorari or mandamus. Hunt v. Village of Bristol, 159 Vt. 439, 440-41, 620 A.2d 1266 (1992). For example, the Supreme "Court has held that review of school board decisions under 16 V.S.A. § 1752 may be obtained by a writ of certiorari. ... [and] therefore, [are] properly viewed as a petition to the superior court for review under Rule 75 in the nature of a writ of certiorari." Burroughs v. West Windsor Board of School Directors, 141 Vt. 234, 237, 446 A.2d 377 (1982). The Supreme Court also has suggested that "the proper route for relief by a party aggrieved by [a judicial or quasi-judicial decision of the Board of Education] is to file a petition for certiorari." Campbell v. Manchester Board of School Directors, 152 Vt. 643, 644, 565 A.2d 1318 (1989) (mem.); accord Inman v. Pallito, 2013 VT 94, ¶ 18, 195 Vt. 218 (Certiorari review applies to quasi-judicial actions, not programming decisions.).

Similarly, the Supreme Court has permitted mandamus review "to require a public officer to perform a simple and definite ministerial duty imposed by law." Sylvester v. Pallito, 2011 WL 4984753, *3 (Vt. March 4, 20110 (unpublished mem.). "[M]andamus ordinarily is not available to compel discretionary decisions. The writ has been extended, however, to reach extreme abuses of discretion involving refusals to act or perform duties imposed by law." Id. (citation omitted.)

Such review is not de novo, but it "is limited to a review of judicial action by inferior courts and tribunals and confined to substantial questions of law affecting the merits of the case." Burroughs, 141 Vt. at 237. "De novo review, whereby the superior court would simply substitute its judgment for that of the [decisionmaker], necessarily usurps power delegated to the executive branch; therefore, that standard is inappropriate unless the statute expressly so provides." Town of Victory v. State, 2004 VT 110, ¶ 16, 177 Vt. 383 (2004). For example, in Garbitelli

v. Town of Brookfield, 2011 VT 122, ¶ 6, 191 Vt. 76, a taxpayer appealed a board of abatement's denial of his request for a tax abatement. The Court noted that

> [a] court reviewing governmental action is typically limited to review of questions of law. . .. Review of evidentiary questions is limited to whether there is any competent evidence to justify the adjudication. . .. Applying this standard, review is normally limited to answering legal questions raised by the factual record developed in the administrative proceeding. (citations and quotations omitted).

Likewise, in Turnley v. Town of Vernon, 2013 VT 42, ¶ 11, 194 Vt. 42, a police chief sought review of the town's decision to terminate his employment. The Supreme Court explained:

> Under V.R.C.P. 75, a review in superior court by way of appellate review or certiorari is virtually synonymous. . .. This review is confined to questions of law and encompasses the consideration of evidentiary points only insofar as they may be examined to determine whether there is any competent evidence to justify the adjudication, much as in the case of a motion for directed verdict. . .. Discretionary rulings may be set aside only for abuse and the judgment is not reviewable on the merits. . . . Under the deferential standard of review accorded administrative and quasi-judicial bodies in these circumstances, it is not for the superior court to independently weigh the evidence to make its own factual findings. Rather, the superior court on a Rule 75 appeal must uphold factual findings if any credible evidence supports the conclusion by the appropriate standard. (citations and quotation marks omitted).

It is somewhat difficult to discern whether the Board's Final Order is properly subject to certiorari or mandamus review. Here, the Plaintiffs allege, inter alia, that the Board's Final Order requiring their merger is unsupported by evidence and otherwise contrary to the law. They also seek an order requiring the Board to make certain findings which they argue are required by law. As examined infra, Act 46 required the Board to issue a Final Order which reflects resolution of factual disputes and the application of law to particular circumstances. See Fullerton Joint Union High School District v. State Board of Education, 32 Cal.3d 779, 788, 187 Cal.Rptr. 398 (1982) ("quasi-legislative" function reviewable by traditional mandamus), abrogated on other grounds in Board of Supervisors v. Local Agency Formation Commission, 3 Cal.4th 903 (1992). Therefore, consistent with the reasoning of the aforementioned decisions, the Court finds that Rule 75 provides jurisdiction to review the Plaintiffs' claims. See Hunt v. Village of Bristol, 159 Vt. at 440 (review available "[w]hen only questions of law, as opposed to fact, are under consideration. . .."); Royalton College, Inc. v. State Board of Education,

127 Vt. 436, 451, 251 A.2d 498 (1969) (order of suspension vacated where authority existed in the board but the "factual justification [for its decision] was not demonstrated").

B. Count I: Procedural Due Process

Counts I, II, and III present overlapping due process arguments. In Count I, the Plaintiffs allege that the process the Board used when considering its Section 9 proposal violated procedural due process. In particular, the Plaintiffs asset that the "Board failed to articulate the standards it used to evaluate the proposal and instead engaged in ad-hoc decision making, thereby denying EMUU-Stowe due process of law." Amended Complaint at ¶ 114. In response, the Defendant argues that the Plaintiffs due process claims must fail as a matter of law because: (1) school districts have no legally cognizable liberty or property interest in their continued existence which would give rise to due process protections; (2) Act 46 created a legislative agency process which cannot be challenged on due process theory; and (3) in any case, the Plaintiffs have not identified any procedural deficiencies in the Board's process. See Defendant's Reply in Support of Motion for Summary Judgment (filed April 2, 2019) at 2.

This Court has already found that entities such as the Plaintiffs do not have a fundamental right to any particular form of school governance; therefore, their objections to changes in school governance imposed under Act 46 do not implicate the violation of a constitutionally protected right. See Athens Ruling on Motions to Dismiss at 6-7; Athens Preliminary Injunction Ruling at 23. Due process protections do not apply unless the government has deprived an individual of a protected property right. See Luck Brothers, Inc. v. Agency of Transportation, 2014 VT 59, ¶10, 196 Vt. 584; cf. Mason v. Thetford School Board, 142 Vt. 495, 499, 457 A.2d 647 (1983) (Legislature may deny appellate review of State Board's decision where "there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent."). It does not appear, therefore, that the Plaintiffs have stated the denial of a fundamental right.

Furthermore, "[d]ue process requirements apply to the procedures that must be used in reaching agency determinations only if they are adjudicative, rather than rulemaking or legislative, in nature." Appeal of Stratton Corp., 157 Vt. 436, 442, 600 A.2d 297 (1991). As this Court recently explained in the Athens case:

> To distinguish a legislative decision from an adjudicative one, Vermont courts examine:
>
> > (1) whether the inquiry is of a generalized nature, rather than having "a specific, individualized focus"; (2) whether the inquiry "focuses on

> resolving some sort of policy-type question and not merely resolution of factual disputes"; and (3) whether the result is of "prospective applicability and future effect."

Gould v. Town of Monkton, 2016 VT 84, ¶ 21, 202 Vt. 535 (quoting Stratton, 157 Vt. at 443).

Applying these three factors, the Board's Final Order is of a general nature in that it reflects decisions affecting a number of schools and school districts. By its nature and intent, the Final Order focuses on resolving the state-wide policy issues addressed in Acts 46 and 49. Finally, the Board's orders are of prospective applicability and future effect. In short, the Board's Final Order reflects "policy determination, involving general facts, and having a prospective application"; this type of administrative action is "characteristic of legislative function" which is not subject to due process protections. Parker, 169 Vt. at 80.

Even if the Board's actions are viewed as "quasi-judicial" in nature, the process implemented by the Legislature and employed by the Board was not governed by the types of procedures which ordinarily govern decisions in contested cases, such as following rules of civil procedure and subpoenaing witnesses. Cf. In re Professional Nurses Service Application for Certificate of Need, 2006 VT 112, ¶¶ 14-15, 180 Vt. 479. At a basic level, the Board was still implementing legislative directives, and the fact that the Plaintiffs' were provided notice of proceedings and opportunities to be heard in a meaningful time and manner provided them with the process to which they were due. See In Re Miller, 2009 VT 112, ¶ 9, 186 Vt. 505. Act 46, § 10, as amended by 2017 Vt. Laws No. 49, § 8, required the following:

> (c) Process. On or after October 1, 2017, the Secretary and State Board shall consider any proposals submitted by districts or groups of districts under Sec. 9 of this act. Districts that submit such a proposal shall have the opportunity to add to or otherwise amend their proposal in connection with the Secretary's consideration of the proposal and conversations with the district or district's under subsection (a) of this section, and in connection with testimony presented to the State Board under subsection (b) of this section. The State Board may, in its discretion, approve an alternative governance proposal at any time on or before November 30, 3018.

The Plaintiffs submitted their Section 9 proposals pursuant to this procedure. Thus, even assuming due process protections are applicable, it is difficult to discern how Plaintiffs were deprived of due process.

Athens Ruling on Motions to Dismiss at 9-10.

Similarly, in this case, due process protections appear inapplicable, but, even assuming the Plaintiffs have raised claims which implicate due process protections, this Court has examined and found constitutionally adequate the procedures the Board used when implementing Acts 46 and 49. See Athens Ruling on Motions to Dismiss at 7 et seq. As recounted supra, the undisputed record shows the Plaintiffs had notice of hearings and also the opportunity to present their positions to decisionmakers. Accordingly, to the extent that the Plaintiffs' claim that the procedures leading to the Final Order violated their right to be heard, their Motion for Summary Judgment is without merit.

Under Count I, as well as under Counts II and III, the Plaintiffs also argue that the Board violated their due process rights by failing to adhere to what they characterize as a "required three-step process" and, as a result, failed to make all findings required by Acts 46 and 49. According to the Plaintiffs,

> [i]n order to force school districts to merge, the Secretary of Education. ... first had to provide answers to three questions:
>
> (1) Was merger "possible"?
>
> (2) Was merger "practicable"?
>
> (3) Was merger "necessary"?"
>
> . . .
>
> The State Board then had two options. First, it could approve the Secretary's recommendation. ... Alternatively, the State Board could amend the Secretary's recommendation and thereby reach a different result. . . . If it went against the Secretary's recommendations, as it did for EMUU-Stowe, the State Board had to consider the school district's alternative governance structure proposals and independently make the three required findings on possibility, practicability, and necessity.

Plaintiffs' Cross-Motion for Summary Judgment at 1-2.

As further addressed infra, it is true that Act 46 required the Secretary and the Board to consider possibility, practicability, and necessity. However, Act 46 does not assign all these terms the same decisional significance as do the Plaintiffs, nor does it outline that these considerations must be explicitly entertained as part of the procedure described by the Plaintiffs.

To some extent, the idea for the Plaintiffs' aforementioned three-step process appears to arise from the July 11, 2018 Memorandum, wherein the Board Chair

attempted generally to assist groups that had submitted Section 9 proposals. The Chair instructed presenters to be prepared to address the following questions:

> a. Why is the Secretary's proposal not "possible" per Act 46, Section 10?
>
> b. Why is the Secretary's proposal not "practicable" per Act 46, Section 10?
>
> c. Why is the proposal you presented the "best" way to meet the Act 46 goals per Act 46, Sections 8(b) and 10?
>
> Provide specific data and references to the requirements of Act 46 to support your contention.

Joint Stipulation at Exhibit I, p. 3. These questions certainly reflect factors which the Legislature intended the Secretary and Board to consider when conducting their analysis under Act 46. However, viewed in context, the questions posed in the July 11 Memorandum were obviously designed to help groups desiring to present further information and arguments regarding the Secretary's recommendations and do not, in and of themselves, establish a mandatory sequence or procedure. In sum, the Court finds the Plaintiffs have not demonstrated that the Board's procedures violated their asserted right to due process.

C. Counts II and III: Necessity and Best Means

In Counts II and III, the Plaintiffs assert that the Board's finding that their forced merger is necessary and the best means of meeting the Goals is arbitrary and capricious. "Courts generally presume that an agency's action is valid. . . and will defer to the agency's judgment in applying a statute that it is charged to execute." Hunter v. State, 2004 VT 108, ¶ 46, 177 Vt. 339 (citations omitted). When examining agency action, a court must consider the entire provision, not just isolated words and phrases. See In re K.A., 2016 VT 52, ¶ 10, 202 Vt. 86 ("[S]tatutes that relate to the same matter . . . must be read together as a whole. . . "); State v. Chambers, 144 Vt. 234, 239, 477 A.2d 110 (1984) (Court "must examine the entire section, and not just the subsection in question, to determine whether sufficient standards exist.")

As noted, the Plaintiffs admit that the forced EMUU-Stowe merger is both possible and practicable; it does not appear they could credibly argue otherwise. As contemplated in Act 46, a merger into a preferred structure is "possible" when it is legally-possible to do so, and "practicable" when merger would not result unnecessarily in geographic isolation. Instead, Plaintiffs argue that the Board additionally was required to state a finding that merger is necessary because it is the "best means" to meet the Goals of Act 46. Plaintiffs' Cross-Motion for Summary

Judgment (filed March 1, 2019) at 3, 35; Plaintiffs' Statement of Undisputed Facts (filed March 1, 2019) at ¶ 67.

The Plaintiffs' argument is flawed in that it rests upon a misinterpretation of the Legislature's directives and intent. For example, Section 8 of Act 46, titled "Evaluation by the State Board of Education" outlines the following approach:

> (a) School districts. When evaluating a proposal to create a union school district pursuant to 16 V.S.A. chapter 11, including a proposal submitted pursuant to the provisions of Secs. 6 or 7 of this act, the State Board of Education shall:
>
> > (1) consider whether the proposal is designed to create a sustainable governance structure that can meet the goals set forth in Sec. 2 of this act; and
> >
> > (2) be mindful of any other district in the region that may become geographically isolated, including the potential isolation of a district with low fiscal capacity or with a high percentage of students from economically deprived backgrounds as identified in 16 V.S.A. § 4010(d).
> >
> > > (A) At the request of the State Board, the Secretary of Education shall work with the potentially isolated district and other districts in the region to move toward a sustainable governance structure that is designed to meet the goals set forth in Sec. 2 of this act.
> > >
> > > (B) The State Board is authorized to deny approval to a proposal that would geographically isolate a district that would not be an appropriate member of another sustainable governance structure in the region.
>
> (b) Supervisory unions. The State Board shall approve the creation, expansion, or continuation of a supervisory union only if the Board concludes that this alternative structure:
>
> > (1) is the best means of meeting the goals set forth in Sec. 2 of this act in a particular region; and
> >
> > (2) ensures transparency and accountability for the member districts and the public at large, including transparency and accountability in relation to the supervisory union budget, which may include a process by which the electorate votes directly whether to approve the proposed supervisory union budget.

Importantly, § 8 must be read in conjunction with the rest of Act 46. Act 46 establishes the presumption that preferred structures best meet all the Goals. It places the burden on an objector to merger into possible and practicable preferred structures to persuade the Board that its alternative structure constitutes a superior means of meeting the statewide and local Goals, which include the establishment of a more consistent statewide governance plan. See 2015 Vt. Laws. No. 46, § 1(e) ("With 13 different types of school district governance structures, elementary and secondary education in Vermont lacks cohesive governance and delivery systems."). As this Court has observed:

> Act 46 does not require the Board to find that the mergers to which they are subject are the only or best means of meeting the Goals set forth in Acts 46 and 49. Properly understood, one overarching objective of Act 46 is to merge school districts; the Legislature already has made the determination that such mergers are necessary to achieve, among its stated Goals, economies of scale and quality education for Vermont's student population. See, e.g., 2015 Vt. Laws No. 46 §§ 5(c)(2), (3) (suggesting alternative structure mergers "achieved whenever possible"). Again, viewed overall, Acts 46 and 49 reflect the Legislature's strong preference that individual school districts be merged, when possible, to create "sustainable models of education governance." 2015 Vt. Laws No. 46, § 2.

Athens Preliminary Injunction Ruling at 17.

Thus, properly understood and applied, § 8(b) offers the Board circumscribed flexibility in circumstances where, for example, there may be a legal or practical impediment to creating a preferred governance structure. Under those circumstances, it permits the Board to consider forming or continuing an alternative governance structure; it may do so if it finds that an alternative structure is the best means of meeting the Goals, and where a preferred structure cannot be formed or is for some reason detrimental to the Goals in Act 46.

Here, then, Act 46 did not, as the Plaintiffs advocate, require the Board to forego establishing a preferred governance structure when such a merger is possible and practicable. In addition, it did not require the Board to address all assertions in their Section 9 proposal for the purpose of weighing whether their current governance structure is "best" as compared to what the Legislature has determined is the "preferred." In other words, when a merger into a preferred governance structure is possible and practicable, that preferred governance structure, according to the Legislature, is presumptively the best means of meeting the Goals, unless the affected school districts establish otherwise. Where, as here, the Board rejected a proposal to maintain an alternate governance structure, that decision is tantamount to a finding that a preferred governance structure will best meet the

Goals established by the Legislature. Furthermore, it reflects that the proponents of the status quo did not meet their burden of convincing the Board that it should forego creating a "possible" and "practicable" preferred structure in favor or retaining their current alternative governance structure.

Nor does the imposition of a preferred governance structure here reflect what the Plaintiffs have argued is "political bias" against alternative governance structures; creation of preferred governance structures, where possible and practicable to do so, is exactly what the Legislature directed the Board to do. It is also significant that the Legislature explicitly tasked the Board to make its decisions in consideration of both local and Statewide concerns and effects; therefore, Plaintiffs' suggestion that mention by Board members of "political concerns" or the possible reception of a decision to maintain the status quo by other communities somehow shows impermissible bias is not well-taken.

The Plaintiffs' also argue their assumption that discussion and comments by one or more board members evidences either the Board's failure to read their submissions or a general reliance on incorrect information. See, e.g., Plaintiffs' Opposition to Cross-Motion for Summary Judgment (filed April 1, 2019) at 8. The Court does not find that the isolated comments which the Plaintiffs highlight support a conclusion that the Board did not read its proposal or otherwise based its decision on materially-erroneous information.

The Plaintiffs' suggestion that the Board did not base its decision on what it characterizes as completely accurate information is not dispositive. As noted supra, this Court's review pursuant to Rule 75 is circumscribed. The Court must determine whether the Board's Final Order is arbitrary and capricious, not whether it would have made the same decision. See Beyers v. Water Resource Board, 2006 VT 65 ¶ 12, 180 Vt. 605 (mem.) ("We review the record to satisfy ourselves that the findings are supported, but we do not reweigh conflicting facts or substitute our judgment for that of the Board."); Braun v. Board of Dental Examiners, 167 Vt. 110, 114, 702 A.2d 124 (1997) ("Thus, we are concerned with the reasonableness of the Board's decision, not how we would have decided the case."); see also Town of Victory, 2004 VT 110, ¶ 16.

The Court is not required to scour the record for agency error; instead, it must determine whether the Board lawfully exercised its statutory discretion and based its decision on facts sufficient to support its determination that merger under Act 46 meets legislatively-outlined goals. See Devers-Scott v. Office of Professional Regulation, 2007 VT 4, ¶ 6, 181 Vt. 248 ("We affirm factual findings of administrative tribunals when they are supported by substantial evidence. . .. Evidence is substantial if, in looking at the whole record, it is relevant and a reasonable person could accept it as adequate.") (citation and quotation marks

omitted. Because the undisputed record supports the Board's decision, the Court is required to uphold it.

The Board was not required to accept the Secretary's entire report. Here, however, it accepted much of the Secretary's analysis. In addition, when viewed in context, the Plaintiffs' argument that the ADM was improperly computed because it did not include prekindergarten students does not present a material factual dispute.

There is no dispute that the Plaintiffs do not currently meet the preferred ADM of 900 when that figure is properly computed. This is a presumptive statutory minimum for preferred structures. See 2015 Vt. Laws. No. 46, § 5(b)(3). This fact alone is sufficient to support the Board's decision, and this Court's affirmance of that decision.

Moreover, there is no dispute that merger is possible and practicable. There is no dispute that the Plaintiffs, in their current, non-merged governance structures, are already effectively working together. There is no support in Act 46 for the Plaintiffs' notion that locally-perceived difficulty in executing further merger into a preferred structure provides an exemption to the formation of a preferred governance structure. All these undisputed facts further support the Board's Final Order.

As outlined, the record also shows that the Plaintiffs were provided ample opportunity to submit their proposals and data corrections and to argue their position prior to the Final Order. Moreover, comments highlighted by the Plaintiffs show that Mr. Carroll did, in fact, read their proposal before voting on the Final Order. Cf. Lewandowski v. Vermont State Colleges, 142 Vt. 446, 453, 457 A.2d 1384 (1983) ("[W]here the whole tribunal has carefully reviewed the record prior to rendering a decision, grievant was not denied due process of law."). Again, it is undisputed that, as of the date of the Final Order, the Plaintiffs did not meet the ADM of 900; the disputes they raise regarding the accuracy of underlying figures identified throughout this process does not change that ultimate fact, nor do they support a finding that the Board's Final Order is arbitrary and capricious. Plaintiffs' Motion for Summary Judgment on Count I, II and III is denied, and the Defendant's Motion for Summary Judgment on Count I, II and III is granted.

D. Count IV: Separation of Powers

In Count IV, the Plaintiffs maintain that the Board's Final Order violates the separation of powers principle and otherwise constitutes a delegation of legislative powers in violation of Chapter II, Section 5 of the Vermont Constitution. As the Plaintiffs acknowledged during oral argument, this Court already has found that

the Legislature's delegation of the implementation of Acts 46 and 49 does not violate Ch. II, § 5 of the Vermont Constitution. See Athens Ruling on Motions to Dismiss at 7; Athens Preliminary Injunction Ruling at 13. As the Court explained in the Athens Ruling on Motions to Dismiss:

> When considering the Plaintiffs' Motion for a Preliminary Injunction, the Court found "the delegation under Acts 46 and 49 is constitutional, and that the Legislation, as supplemented by the Board's regulations, supplies sufficient, statute-consistent standards to guide its decisions and to permit this Court's review" of whether the agencies' actions were otherwise arbitrary and capricious. Preliminary Injunction Ruling at 13. Applicable Vermont case law, while sparse, supports this conclusion.
>
> The Vermont Supreme Court has explicitly held that in Vermont, the obligation to provide a public education is a State, not a local, obligation. Brigham v. State, 166 Vt. 246, 256, 692 A.2d 384 (1997). In this case, the State determined that it will meet that obligation by delegating the administration of Acts 46 and 49 to the Vermont Board of Education. See State v. Auclair, 110 Vt. 147, 4 A.2d 107, 114 (1939) ("An agency charged with the duty of administering a statute enacted in pursuance of the police power of the State may be vested with a wide discretion . . ."). The Legislature's delegation of the implementation of Acts 46 and 49, including the modification of existing governance bodies, is properly encompassed in that obligation to provide a public education. See Village of Hardwick v. Town of Wolcott, 98 Vt. 343, 129 A. 159 (1925) (property held by municipalities for public purposes belongs to State).
>
> The Plaintiffs again assert that In re Municipal Charters, 86 Vt. 562, 86 A. 307 (1913) provides relevant precedent for their argument that the delegation under Acts 46 and 49 violates the Vermont Constitution. In re Municipal Charters is an advisory opinion wherein the Vermont Supreme Court opined that an act delegating authority to the Public Service Commission to charter villages violated the powers expressly reserved to the Legislature under Ch. II. § 6 of the Vermont Constitution. 86 Vt. at 562. Because the power to "constitute towns, boroughs, cities, and counties" in § 6 requires the Legislature to exercise its own judgment and "no authority is given to delegate it," the Court advised that the legislature could not delegate village charter creation. However, the Court further observed:
>
> > This, however, is not saying that the Legislature can delegate nothing concerning this matter, for there are undoubtedly some things pertaining to it that the Legislature can delegate. But we are not called upon to draw the line between the delegable and the

> nondelegable, nor to suggest a way in which the desideratum of a general law for the incorporation of villages can be attained.

Id. Accordingly, to the extent In re Municipal Charters has precedential value, it is inapposite to the present situation and does not foreclose otherwise proper delegation by the Legislature.

An examination of relevant provisions of Ch. II further indicates that Count II of the Amended Complaint is insufficient as a matter of law. Chapter II, § 5 outlines that the "Legislative, Executive and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." While the General Assembly cannot delegate its legislative functions, it nevertheless may delegate to administrative agencies, such as the Board of Education, the power to apply general provisions of the law to particular circumstances. See Vincent v. Vermont State Retirement Board, 148 Vt. 531, 535, 536 A.2d 925 (1987). On its face, § 5 does not embody a broad prohibition on the Legislature from making a proper and lawful delegation of powers. See, e.g., Stowe Citizens for Responsible Government v. State, 169 Vt. 559, 560-61, 730 A.2d 573 (1999) (mem.).

Ch. II, §6 sets forth the limitation on the Legislature's ability to delegate addressed in In re Municipal Charters. In relevant part, Ch. II, § 6 provides that the Senate and House of Representatives

> may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, borroughs [sic], cities and counties; and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish or infringe any part of this Constitution.

Contrary to the Plaintiffs' assertion, Ch. II, § 6 does not require one to conclude that Acts 46 and 49 are a "whole-cloth delegation" allowing the Board to establish chartered "municipal corporations" in the form of merged school districts. See Plaintiffs' Reply Memorandum at 14 et seq. As examined in In re Municipal Charters, § 6 is a provision which authorizes the Legislature to "grant charters of incorporation" or otherwise "constitute," in the sense of establishing, governmental subdivisions such as towns and cities. See, e.g., Merriam Webster Online. Retrieved April 5, 2019, from www. Miriam-webster.com (constitute means to set up or establish). It does not set forth a non-delegable duty, relating to school boards, of the type examined in In re Municipal Charters. This conclusion is further supported

by Vermont Constitution Ch. II. § 68, which in relevant part more specifically states:

> Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town *unless the general assembly permits other provisions for the convenient instruction of youth.* (emphasis added).

Thus, it is explicitly within the Legislature's constitutional authority to pass laws like Acts 46 and 49, and, with sufficient guidance and direction, authorize the Board to implement "other provisions" to provide Vermont students instruction. Accord 16 V.S.A. § 821 (a)(3) ("Each school district shall maintain one or more approved schools . . . unless . . . the General Assembly provides otherwise."); cf. Brigham, 166 Vt. at 264 (Education Clause is silent on means of supporting and funding schools, "which can and should be modified if it no longer fulfills its purpose.".); Dresden School District v. Norwich Town School District, 124 Vt. 227, 232, 203 A.2d 598 (1964) ("The power of the Legislature to create necessary agencies to implement and administer governmental functions is unquestioned, so long as constitutional prohibitions are observed. . ..").

Finally, the Plaintiffs argue that construing Acts 46 and 49 as permitting the Board to formulate and implement the Default Articles of Agreement will result in an unconstitutional delegation of the General Assembly of its power to legislate. See Plaintiffs' Sur-reply at 19. "Act 49 provides that districts subject to involuntary merger under the Final Report have 90 days to adopt their own articles of agreement; otherwise, those districts are subject to the Board's Default Articles of Agreement." Preliminary Injunction Ruling at 20. On its face, Act 49, § 8 (d) specifically authorized the Board to formulate Default Articles of Agreement and to implement them, if needed, stating: "The statewide plan required by subsection (b) of this section shall include default Articles of Agreement to be used by all new unified union school districts created under the plan unless and until new or amended articles are approved." Under these circumstances, this authorization is not a delegation of the Legislature's power to pass laws. Rather, Act 49, § 8 permissibly grants authority necessary to implement the Legislature's delineated goal of moving "toward sustainable models of educational governance." 2015 Vt. Laws No. 46, § 2; see Stowe Citizens, 169 Vt. at 560-61 ("Nor is the [delegation] doctrine violated when the Legislature gives municipalities the authority or discretion merely to execute, rather than make, the laws."); Royalton College, Inc. v. State Board of Education, 127 Vt. 436, 449, 251 A.2d 498 (1969) ("The

provision for the adoption of rules and regulations to implement the duties of the board are sufficient indicia that the legislature had in mind that these powers must be reasonably exercised and the demands of procedural due process respected.").

For the reasons set forth in the Preliminary Injunction Ruling, and as further examined herein, the Court finds the Legislature's delegation of the implementation of Acts 46 and 49 does not violate the Ch. II, §§ 5, 6 and 68 of the Vermont Constitution.

Athens Ruling on Motions to Dismiss at 4-7.

Accordingly, in this matter, the Plaintiffs' Motion for Summary Judgment on Count IV is denied, and the Defendant's Motion for Summary Judgment on Count IV is granted.

III. Conclusion

The Defendant's Motion for Summary Judgment is *granted*, and the Plaintiffs' Cross Motion for Summary Judgment is *denied*.

The Clerk is directed to enter final judgment on all counts in favor of the Defendant.

SO ORDERED this 29th day of April, 2019.

Robert A. Mello
Superior Court Judge